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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

V.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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OPINION
(Filed March 26, 1981)

No. 80-1400

United States Court of Appeals, Fourth Circuit

Juan Carlos MORENO; Juan Pablo Otero; Clare B. Hogg; Renee Otero, Jr., Appellees,

v.

UNIVERSITY OF MARYLAND, and John S. Toll, President, University of Maryland, Appellants.
(645 F.2d 217 (4th Cir. 1981))

Argued Jan. 8, 1981

Decided March 26, 1981

Before WINTER, RUSSELL, and ERVIN, Circuit Judges.

PER CURIAM:

The President of the University of Maryland appeals from the judgment of the district court ordering him to permit plaintiffs to demonstrate their entitlement to "In-State" status for purposes of tuition and other fees charged by the University and to refund the difference between the "Out-of-State" tuition and fees actually paid by plaintiffs and the "In-State" tuition and fees they would have paid had they been permitted to demonstrate their entitlement thereto since July 13, 1976, the date of the district court's original judgment in their favor. We affirm.

I

Plaintiffs represent a class of individuals holding "G-4" visas who attend the University of Maryland. The named plaintiffs are dependents of foreign national employees of the Inter-American Development Bank and the International Bank for Reconstruction and Development. Employees of these development banks and other international organizations, together with their immediate families, are classified as nonimmigrant aliens in this country under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976). Unlike most nonimmigrant aliens, employees of international organizations often reside permanently in the United States; the development banks, for example, are headquartered in Washington, D.C. Plaintiffs reside in the Maryland suburbs of Washington. Unlike most aliens holding immigrant visas, employees of international organizations are exempt from federal and state income taxation, either by treaty (*e. g.*, Agreement Establishing the Inter-American Development Bank art. XI, § 9(b), [1959] U.S.T. 3029, T.I.A.S. No. 4397; Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 9(b), 60 Stat. 1440, T.I.A.S. No. 1502 (1945)), or by statute, 22 U.S.C. § 288 (1976). The exemption, however, applies only to "salaries and emoluments" paid by the international organizations. The plaintiffs are subject to federal and state taxation on all other income and to federal, state and local excise, motor vehicle, real estate, retail sales and other taxes and charges.

At the time plaintiffs originally brought this suit in 1975, the University of Maryland had a policy of charging "Out-of-State" students higher tuition and other fees than it charged "In-State" students. It based the determination of "In-State" status on the student's showing of Maryland "domicile." The policy was phrased such that plaintiffs, despite their Maryland residency, could not establish Maryland "domicile," because they were nonimmigrant aliens. Plaintiffs challenged the policy in the district court pursuant to 42 U.S.C. § 1983 (1976) on the grounds that it

denied them due process of law and equal protection under the fourteenth amendment and that it interfered with federal prerogatives over international agreements and immigration in violation of the Supremacy Clause of article VI.

The district court granted summary judgment to the plaintiffs on July 13, 1976. Following *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), it held that the University's policy of denying "In-State" status to "G-4" nonimmigrant aliens created an "irrebuttable presumption" inconsistent with due process of law because the presumption that the plaintiffs could not establish Maryland "domicile" was not universally true and because University officials refused to permit the plaintiffs to prove "domicile." The court ordered the University officials to allow students with "G-4" visas to demonstrate Maryland "domicile" and thereby to qualify for "In-State" status. It reserved for plenary consideration the question of whether in fact the named plaintiffs could establish "domicile," and determined that it need not consider the plaintiffs' equal protection and Supremacy Clause claims in view of the due process basis for relief. *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976).[1]

The University president obtained a stay of the district court order pending appeal. In lieu of granting "In-State" status to students with "G-4" visas who could demonstrate Maryland "domicile," the University agreed to refund the difference between the "Out-of-State" tuition and fees the students would actually pay and the "In-State" tuition and

[1] In accordance with *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the court dismissed the claim against the University itself, holding it to be an agency of the State of Maryland. Plaintiffs did not appeal this dismissal, so we have no occasion to decide whether the University can be sued under § 1983. *Cf. Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Long v. Richardson*, 525 F.2d 74, 77 (6 Cir. 1975).

fees they would have paid "but for the stay" in the event the district court's order "were finally affirmed on appeal."

We affirmed the district court's order without opinion, *Moreno v. Elkins*, 556 F.2d 573 (4 Cir. 1977), and the University president sought and obtained a writ of certiorari from the Supreme Court. On the merits, the Supreme Court stated that if the plaintiffs could establish Maryland "domicile," *Vlandis v. Kline* would control, and the Court would have to overrule that case to deny them relief. It declined to do so, choosing instead to obtain a possibly dispositive authoritative interpretation of state law. The Court held that federal law did not prevent a "G-4" nonimmigrant alien from establishing "domicile" in this country, and that state law would thus determine the issue. In the absence of Maryland precedent, the Court certified the question of whether Maryland law prohibited "G-4" nonimmigrant aliens from establishing Maryland "domicile" to the Court of Appeals of Maryland. *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978).

The Court of Appeals of Maryland answered the question in the negative. It held that neither the exemption from state income taxation enjoyed by "G-4" aliens nor their inability to vote in state elections precluded them from becoming domiciled in Maryland, particularly in view of the Supreme Court's express holding that "G-4" aliens could establish permanent residence in the United States. *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979).[2]

While the case was pending before the Maryland court, the University Board of Regents purported to "clarify" its "In-State" status policy by passing a resolution on June 23, 1978, precluding nonimmigrant aliens from qualifying for "In-State" status. The Supreme Court, supplementing its earlier opinion, recognized that the resolution "fundamentally altered the posture of the case," raising new constitutional issues. It remanded the case to the district

[2] John S. Toll replaced Wilson H. Elkins, the original defendant, as President of the University of Maryland on July 1, 1978.

court "for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." *Toll v. Moreno*, 441 U.S. 458, 461-62, 99 S. Ct. 2044, 2045-46, 60 L. Ed. 2d 354 (1979).

II

[1] On remand, the district court first reviewed the status of the due process issue in the case. It concluded that the Supreme Court's original decision in *Elkins* and the Maryland Court of Appeals' decision in *Toll* established plaintiffs' ability to prove Maryland "domicile." The University's policy prior to June 23, 1978, thus created an impermissible irrebuttable presumption, denying due process of law to the plaintiffs. The district court further held that the University's policy after that date, expressed in the Board of Regents' resolution, no longer created an irrebuttable presumption, because under the University's more restrictive definition, nonimmigrant aliens could never prove "domicile" and qualify for "In-State" status. *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979). For reasons sufficiently stated in the opinion of the district court, we agree that the University's "In-State" status policy denied due process of law to the plaintiffs prior to June 23, 1978.

III

[2] The district court then considered the University's policy after June 23, 1978, challenged by plaintiffs on the equal protection and Supremacy Clause grounds deferred previously by the court. Applying strict scrutiny to the suspect classification of nonimmigrant aliens, the district court held that the University could not advance an interest sufficiently substantial to justify the policy, and that the application of the policy to plaintiffs denied them equal protection of the laws. The court also held that the policy constituted state interference with the federal prerogative over immigration in violation of the Suprema-

cy Clause. *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980). For reasons sufficiently stated in this opinion of the district court, we agree that the University's "In-State" status policy before and after June 23, 1978, is invalid under the Constitution and that the plaintiffs are accordingly entitled to relief.

IV

The district court reaffirmed its order enjoining the University president from enforcing the "In-State" status policy as applied to plaintiffs and directing him to permit students with "G-4" visas to demonstrate Maryland domicile. It also ordered the University president to refund the difference between the "Out-of-State" tuition and fees actually paid by those students who could have demonstrated entitlement to "In-State" status since July 13, 1976, the date of the original district court order, and the "In-State" tuition and fees they would have paid had the University not unconstitutionally applied its "In-State" policy to "G-4" nonimmigrant aliens. The refund was ordered pursuant to the University's agreement to pay the tuition and fees differential when it obtained a stay of the original district court order of July 13, 1976, pending appeal.

[3] The University now argues that this refund violates the eleventh amendment because it represents retrospective relief requiring the payment of state funds. It cites and relies upon *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979), *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and *Jaqnandan v. Giles*, 538 F.2d 1166 (5 Cir. 1976), *cert. denied*, 432 U.S. 910, 97 S. Ct. 2959, 53 L. Ed. 2d 1083 (1977). Those cases recognize, however, that a state can waive its eleventh amendment immunity. The University did so explicitly in this case by agreeing to pay the refunds when it obtained the stay of the original district court order.

[4] The University now contends that the original order was vacated, thus freeing it from its obligation. The Supreme Court, however, only vacated the judgment of this court in order to remand the case to the district court for consideration of the "new issues of constitutional law" raised by the policy change promulgated in the Board of Regents' resolution of June 23, 1978. *Toll v. Moreno*, 441 U.S. at 462, 99 S. Ct. at 2046. Contrary to the University's contention, the district court had continuing jurisdiction over this suit because it expressly did not resolve all the issues in the litigation by its original order. The Supreme Court could not have simply affirmed the original order because it provided for injunctive relief possibly no longer relevant in view of the Board of Regents' resolution. This change in the posture of the case was attributable solely to the action of the University. It should not, therefore, provide a basis for excuse of the University's obligation to refund tuition and fee differentials agreed to in order to prevent immediate implementation of the relief ordered by the district court. The price the University paid to stay the injunction of its constitutionally invalid policy was waiver of its eleventh amendment immunity. It has failed to vindicate that policy, so it must pay the refunds to which it agreed.

AFFIRMED.

ORDER

United States Court of Appeals
For the Fourth Circuit

No. 80-1400

Juan Carlos Moreno; Juan Pablo Otero; Clare B. Hogg; Renee Otero, Jr.;

Appellees,

versus

University of Maryland,

and

John S. Toll, President, University of Maryland,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, District Judge.

(Filed April 15, 1981)

Upon motion of the appellants, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court — by Direction.

/s/ WILLIAM K. SLATE, II
Clerk.

ORDER

United States Court of Appeals
For the Fourth Circuit

No. 80-1400

Juan Carlos Moreno; Juan Pablo Otero; Clare B. Hogg; Renee Otero, Jr.;

Appellees,

versus

University of Maryland,

and

John S. Toll, President, University of Maryland,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, District Judge.

(Filed May 11, 1981)

Upon motion of the appellants, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional 30 days to and including, June 15, 1981, pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court — by Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

United States Court of Appeals
For the Fourth Circuit

No. 80-1400

Juan Carlos Moreno, et al,

Appellees,

versus

University of Maryland and
John S. Toll, etc.,

Appellants.

ORDER

(Filed June 9, 1981)

Upon motion of the appellants, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is hereby, stayed pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this court within the time allowed by law or order of Supreme Court.

For the Court — By Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

United States District Court,
D. Maryland.

Juan Carlos MORENO et al., Plaintiffs,

v.

John S. TOLL, President, University of Maryland, Defendant.

(480 F. Supp. 1116 (D. Md. 1979))

Civ. A. No. M-75-691.

MEMORANDUM

(Filed October 31, 1979)

JAMES R. MILLER, Jr., District Judge.

I. Statement of Facts

This case was initially filed as a class action by three named plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg seeking declaratory and injunctive relief against the University of Maryland and Dr. Wilson H. Elkins, then president of the University. The plaintiffs sought relief for themselves and for others similarly situated from the University of Maryland's "In-State Policy" which prohibited non-immigrant aliens from establishing in-state student status at the University. The plaintiffs claimed that this policy was invalid in that it created a constitutionally impermissible irrebuttable presumption which denied them due process of the law, and that it violated the Equal Protection Clause of the Constitution.

The policy in question was adopted by the Board of Regents of the University of Maryland, effective January 1, 1974. This policy creates two classes of students, "in-state" and "out-of-state", for purposes of considerations

for admissions, tuition rates, and charge differentials. The relevant provisions of the policy are as follows:

"General Policy"

"1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to *immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States,* in the following cases:

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester. (Emphasis added).

* * * * * * *

"2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge differential purposes in all other cases.

* * * * * *

"Definitions"

"1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

"4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland.

For purposes of this policy only one domicile may be maintained at a given time . . ."

There are eight criteria which the University takes into consideration in determining whether Maryland domicile has been established by the relevant person. These criteria are whether the individual:

a. Owns or rents and occupies real property in Maryland as his (her) domicile on a year-round basis.

b. Maintains a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintains within the State of Maryland all or substantially all personal possessions.

d. Pays Maryland income tax on all earned income including taxable income earned outside the State.

e. Registers all owned motor vehicles in Maryland.

f. Possesses a valid Maryland driver's license, if licensed.

g. Registers to vote in Maryland, if registered.

h. Gives a Maryland home address on federal and state income tax forms.

In the present case, the three named plaintiffs were students at the University of Maryland, College Park Campus. Each was financially dependent upon a parent who was in the country on a G-4 visa.[1] In each case the University determined that these plaintiffs were not

[1] 8 U.S.C. § 1101(a)(15)(A) through (L) provides the definitions of the various classifications of nonimmigrant aliens. Subsection (G), applicable in this case, provides as follows:

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) accredited resident members of the staff of

entitled to "in-state" status. This ruling was initially predicated upon the University's belief that holders of G-4 visas were incapable of forming the requisite intent to become Maryland domiciliaries. All three plaintiffs unsuccessfully challenged this ruling through the University's appellate process in an attempt to show that they were, in fact, Maryland domiciliaries.[2] The plaintiffs then filed suit in this court.

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such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

[2] The pertinent facts regarding these plaintiffs are as follows:

Plaintiff Moreno's parents are both citizens of Paraguay and holders of G-4 visas, as Moreno had worked for the Inter-American Development Bank for 14 years as of the time this suit was filed. The Morenos have owned a home in Maryland since 1963; both parents are licensed to drive in this State and their vehicle is registered here. Plaintiff Moreno is also licensed to drive in Maryland. Plaintiff Moreno filed tax returns in both the United States and Maryland in 1973 and 1974.

Plaintiff Otero's father is a citizen of Bolivia, also in the country on a G-4 visa and working in the Inter-American Development Bank; Mrs. Otero is a United States citizen. The Oteros moved to Maryland and have owned a home here since 1965.

Both the Oteros and their son are licensed to drive in Maryland; their vehicle is registered in Maryland. Plaintiff Otero filed both United States and Maryland tax returns in

II. History of the Case

On July 13, 1976, this court filed an opinion in this case following a hearing on motions by both parties for summary judgment. *Moreno v. University of Maryland,* 420 F. Supp. 541 (D. Md. 1976). At that time the defendant University of Maryland was dismissed from this action since it was held not to be a "person" within the meaning of 42 U.S.C. § 1983. This court also granted plaintiffs' motion to certify this matter as a class action. The court then held:

> "That the 'In-State Policy' of the University of Maryland which denies to G-4 aliens by the use of an irrebuttable presumption of non-domicile the opportunity to establish 'in-state' status is unconstitutional as it is in violation of the Due Process Clause of the Fourteenth Amendment, and (6) [t]hat defendant Dr. Wilson H. Elkins is hereby enjoined from enforcing the University of Maryland's 'In-State Policy' with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to 'in-state' status for purposes of tuition and charge differential determinations." Id. at 565.[3]

1972, 1973 and 1974. Plaintiff Otero applied to have his visa status changed to that of an immigrant.

Plaintiff Hogg's parents are citizens of the United Kingdom and holders of G-4 visas. Mr. Hogg has been employed by the International Bank since 1962. The Hoggs moved to Maryland in 1970 and own a home in the state. The Hoggs and their daughter are licensed to drive in Maryland, and their vehicle is registered there. The Hoggs paid taxes to both the United States and Maryland on income other than Mr. Hogg's salary. Plaintiff Hogg also filed tax returns in 1973 and 1974.

All three families have paid state and local retail taxes, real estate taxes, vehicle, fuel, excise and other taxes. The plaintiffs' complaint states an intent, both on the part of the plaintiffs and their families, to remain in Maryland indefinitely.

[3] It should be noted that these provisions of the court's original order were stayed, pending appeal, on condition that, in the event the appeal was unsuccessful, the University agreed to

Defendant appealed and the Court of Appeals for the Fourth Circuit affirmed the district court decision 556 F.2d 573 (4th Cir. 1977). The Supreme Court granted certiorari 434 U.S. 888, 98 S. Ct. 260, 54 L. Ed. 2d 173 (1977), to consider whether this decision conflicted with the decision in *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

The Supreme Court, in addressing this case, initially held that "the federal constitutional issues in this case cannot be resolved without deciding an important issue of Maryland law." It therefore certified the question of state law to the Maryland Court of Appeals. *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978).

In its consideration of the case, the Supreme Court concluded that "the gravamen of [the] dispute is unquestionably whether, as a matter of federal and Maryland law, G-4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland [since the] University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement, its 'paramount' and controlling concern is with domicile as defined by the courts of Maryland." *Id.* at 658-659, 98 S. Ct. at 1345.[4] Accordingly the Court found this case to be "squarely within *Vlandis*[5] as limited by *Salfi*[6] to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile]

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refund the difference between "out-of-state" and "in-state" charges assessed to eligible students with G-4 visas enrolled in the University in the semester commencing in the Fall of 1976 or any semester thereafter.

[4] See *Elkins v. Moreno*, 435 U.S. 647 at 659 n.8, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978) for the Supreme Court's summary of the defendant's insistence that this case is governed by the Maryland law of domicile.

[5] *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 39 L. Ed. 2d 63 (1973).

[6] *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

the opportunity to show factors clearly bearing on that issue.' "*Id.* at 660, 98 S. Ct. at 1346, quoting *Weinberger v. Salfi*, 422 U.S. at 771, 95 S. Ct. 2457. The Court found it unnecessary to review the *Vlandis* rationale, given the posture of the case.[7] Accordingly, the Court certified the following question to the Maryland Court of Appeals:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Id.* 435 U.S. at 668-669, 98 S. Ct. at 1351.

The Supreme Court upheld the conclusion of this court, as a matter of federal law, that G-4 aliens are not precluded from acquiring domicile in their state of residence. *Id.* at 665-667, 98 S. Ct. 1338.

Mr. Justice Rehnquist, joined by Chief Justice Burger, filed a dissent in this action based on his conclusion that the due process issue could be decided without resolving the question of Maryland domicile law. The dissent contended that domicile was not the sole criterion looked upon by the University in this case.[8] Rather, domicile and

[7] The Court found no necessity to review the Constitutional principles since the issue could apparently be avoided given either a positive or negative response by the Maryland Court of Appeals. If a G-4 alien were found to be incapable of obtaining domicile in Maryland, then any "irrebuttable presumption" would be universally true and therefore would present no constitutional issue. If, however, G-4 aliens were found to be capable of acquiring domicile in Maryland the Court found that the University "apparently ha[d] no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it ha[d] indicated both [there] and [here] that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens [could] have the requisite intent." *Elkins v. Moreno*, 435 U.S. at 661, 98 S. Ct. at 1347.

[8] The dissent contended that, under the applicable University policy the criteria initially examined are whether the student is either a "United States citizen" or an "immigrant alien lawfully admitted for permanent residence." If the student satisfied these

other factors, including cost equalization, were reasons for the University's determination that nonimmigrant aliens should not be accorded the benefits given under the in-state policy to citizens and immigrant aliens domiciled in the state. Accordingly, the dissent maintained that this case does not fall squarely within the decision in *Vlandis v. Kline*.[9] *Id.* at 675, 98 S. Ct. 1338. This dissent maintained that the constitutional issues are controlled by *Weinberger v. Salfi, supra* at note 5, and accordingly concluded that the state law question need not be certified in order to resolve the due process issues presented.

Following the Supreme Court decision, the Court of Appeals of Maryland addressed the certified question of whether or not G-4 aliens are precluded by state law from acquiring domicile in Maryland. *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979). The court held that nothing in the general Maryland law of domicile renders G-4 visa holders, or their dependents, incapable of becoming domiciled in Maryland. The court, however, noted that the defendants' posture in presenting this question had altered significantly since the Supreme Court's decision in this case. The Court of Appeals referred to this as an apparent attempt by the defendants to adopt the dissent's contention that the Maryland law of domicile is not determinative of this case, despite prior assertions to the contrary. Consistent with the defendants' altered view, the Board of Regents of the University passed a resolution on June 23, 1978 declaring in part that:

> "The Board of Regents deems its statutory authority under the laws of Maryland to include the power, right, or privilege to adopt a more restrictive definition of domicile for purposes of according in-state

initial criteria, the University then addressed the question of domicile. *Elkins v. Moreno*, 435 U.S. at 670, 98 S. Ct. at 1351.

[9] *Vlandis v. Kline* held that where a State "purport[s] to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue." *Weinberger v. Salfi*, 422 U.S. at 771, 95 S. Ct. at 2470 (citing *Vlandis v. Kline*, 412 U.S. at 452, 93 S. Ct. 2230).

status for admissions, tuitions, and charge differentials than may be applicable generally or otherwise under the Maryland common law."

The Court of Appeals did not address this contention, as it was beyond the scope of the question certified for its consideration. *Id.* at 434, 397 A.2d 1013.

Following the decision in the Court of Appeals, the defendants attempted to restore this case to the active docket of the Supreme Court. The Supreme Court initially took note of the June 23, 1978 statement of the Board of Regents of the University of Maryland entitled "A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admissions, Tuition, and Charge-Differential Purposes, insofar as It Denies In-State Status to Nonimmigrant Aliens."[10] This statement, pur-

[10] The full text of the statement provides as follows:

"Purposes and Interests of In-State Policy. The Board of Regents finds and declares that the policy approved on September 21, 1973, insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:

"(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;

"(b) achieving equalization between the affected classes of the expense of providing educational services;

"(c) efficiently administering the University's in-state determination and appeals process; and

"(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

"Reaffirmation of In-State Policy. Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland, common law, the Board of Regents reaffirms that policy because it intends and

porting to reaffirm the University's policy regardless of whether or not it conforms with the Maryland law of domicile, runs counter to the Supreme Court's original premise that the University would re-draft its policy to accommodate G-4 aliens were the Maryland courts to hold them capable of acquiring domicile.[11] Upon noting this, the Supreme Court held that if domicile is not the "paramount" policy consideration, then this case no longer falls squarely within *Vlandis* as limited by *Salfi*,[12] and accordingly the new constitutional issues raised by the clarifying resolution should be considered in the first instance by this court. *Toll v. Moreno*, ___ U.S. ___, 99 S. Ct. 2044, 60 L. Ed. 2d 354. Thus the case is before this court on remand from the Supreme Court for "consideration in light of [the] opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and The Board of Regent's Clarifying Resolution of June 23, 1978."

II. Present Posture of the Case

This action is now before the court for an initial determination of what issues remain to be resolved. Pursuant to the court's request, both parties have filed memoranda outlining their respective positions regarding the effect which the clarifying statement of the Board of Regents has had on this case along with their views regarding the identity of the other issues which remain for the court's decision. After having examined the briefs, the court has concluded that an oral hearing on this matter now before it is not necessary. Local Rule 6.

The plaintiffs initially contend that the following three issues still remain in this case:

1. Whether the University's in-state policy violates the Equal Protection Clause of the Constitution;

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deems it to serve a number of substantial purposes and interests, including but not limited to those set forth above."

[11] *See, Elkins v. Moreno*, 435 U.S. at 660, 98 S. Ct. 1338.

[12] *See*, notes 6-7, *supra*.

2. Whether the policy still creates an unlawful irrebuttable presumption as construed by *Vlandis v. Kline*; and

3. Whether the policy violates the Supremacy Clause of the Constitution.

The University's response details its position that the issue of cost equalization, as highlighted by the Board of Regent's clarifying resolution. is not new to this case but has been advanced by the defendants throughout the history of this litigation. The defendants contend that the Supreme Court decision in *Moreno v. Toll, supra,* has effectively removed the irrebuttable presumption issue from this case.

The plaintiffs' response is that the defendants' position throughout this litigation, up to the point of certification to the Court of Appeals, was that the Maryland law of domicile was the controlling question in this case. Plaintiffs maintain that the cost equalization arguments raised in the course of this litigation were presented as a rationalization of interests served by the policy. The plaintiffs further maintain that the irrebuttable presumption issue has not been removed from the case by the Supreme Court's decision but rather its continued viability is one of the issues remanded for this court's consideration.

A. The Irrebuttable Presumption Issue

1. The Effect of the Supreme Court's Rulings

[1] The first issue which this court must address is that of whether or not the second Supreme Court opinion removed the irrebuttable presumption issue from this case. Counsel have filed radically different readings of the relevant portions of the Supreme Court opinion, with plaintiffs' counsel maintaining that this issue remains viable and defendants' counsel contending that the "law of the case" is that this issue has been removed from the case.

In my judgment, the correct interpretation of the Court's second decision can only be obtained by reading it in

conjunction with the Court's earlier opinion in *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978). The Court clearly premised its treatment in the earlier case on two factors: "Because petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* . . ." *Id.* at 660, 98 S. Ct. at 1346. The Court based this treatment on its finding that "the gravamen of [the] dispute is unquestionably whether, as a matter of federal and Maryland law, G-4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland. [Since the] University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement, its 'paramount' and controlling concern is with domicile as defined by the courts of Maryland." *Id.* at 658-659, 98 S. Ct. at 1345.

Subsequent to this Supreme Court decision, the Board of Regents of the University adopted its "clarifying" resolution. This resolution advanced the interest of cost-equalization as a factor in the in-state policy. Further, the resolution reaffirmed the existing policy, irrespective of whether or not it was ultimately found to conform with the Maryland law of domicile. This position clearly altered the posture upon which the first Supreme Court decision was premised.

Turning now to the Supreme Court decision, *Toll v. Moreno*, 441 U.S. 458, 99 S. Ct. 2044, 60 L. Ed. 2d 354 (1979), we find the court saying:

> ". . . the Board of Regent's Clarifying Resolution has fundamentally altered the posture of the case. [The] decision in *Elkins* rests on the premise that 'the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy "to accommodate" G-4 aliens

> were the Maryland courts to hold that G-4 aliens can acquire such domicile. [435 U.S. at 661]. After the Clarifying Resolution, this premise no longer appears to be true. And if domicile is not the 'paramount' policy consideration of the University, this case is no longer 'squarely within *Vlandis* as limited by *Salfi* . . . [*Id.*, at 660, 98 S. Ct. 1338.]' " 99 S. Ct. at 2045-2046.

Read in context, this decision does not "remove the irrebuttable presumption issue from the case entirely." (Defendant's Memo at 11). Rather, the Supreme Court ruling holds that, since the University has indicated it no longer plans to re-draft the in-state policy in response to the decision of the Maryland Court of Appeals to the effect that G-4 aliens can acquire Maryland domicile, it is no longer apparent that domicile is the paramount consideration of this case. *If* domicile is not the paramount consideration, then this case is no longer governed by *Vlandis* as limited by *Salfi*. The Supreme Court did not conclusively rule on this point; rather it is one of the issues remanded to this court for determination.

2. Is Domicile Now the "Paramount" Policy Consideration?

The next question which must be addressed is that of whether or not domicile is the paramount policy consideration in this case. Counsel for both parties have filed detailed memoranda citing instances in the lengthy history of this case in which the defendants, through counsel, discussed the basis of the in-state policy. Plaintiffs' counsel lists various occasions upon which the defendants maintained that domicile was the central issue; defendants' counsel has countered with references to instances in which cost equalization justifications were raised and discussed. This matter cannot be resolved, however, by a comparison of out of context references to statements by the defendants, but rather must be examined in light of the actual policy statement, the clarifying resolution, and the overall case history.

The plain wording of the in-state policy provides that the University will grant in-state status to "United States citizens, and to immigrant aliens . . ." who have been "domiciled" in Maryland, for six months, or, in the case of a dependent student, whose parent or spouse has been domiciled in the state for six months. Thus, as noted by Mr. Justice Rehnquist in his dissent in *Elkins*,[13] and as now advanced by the defendants, the initial hurdle in an in-state status determination is a showing of United States citizenship or immigrant alien status. Absent citizenship or immigrant status, the University does not even reach the question of domicile. The dissent, and now the defendants, contend that what this policy does is to classify nonimmigrant aliens as out of state students for a variety of reasons, one of which is the University's belief that these nonimmigrant aliens lack the capacity to become Maryland domiciliaries. Other reasons would include the rationale of cost equalization. Thus the dissent concludes that there is no irrebuttable presumption based on *domicile* since the initial determination of eligibility for in-state status hinges on a showing of citizenship or immigrant status, and the plaintiffs may present any relevant evidence on that point.

Despite the logical appeal of this argument, it is apparent that the overall goal of the University's In-State Policy is to grant admission, tuition, and charge differential benefits to Maryland domiciliaries. The present policy precludes nonimmigrant aliens from consideration for these benefits. The question that must initially be addressed, according to the remand from the Supreme Court in *Toll*, is whether the domicile issue is the "paramount" concern of the University in this case in order to determine whether this policy establishes an irrebuttable presumption precluded by *Vlandis* as limited by *Salfi*.

Despite the defendants' present assertion to the contrary, it is apparent that up until the time of certification

[13] *See, Elkins v. Moreno, supra*, 435 U.S. at 669-676, 98 S. Ct. 1338.

of the domicile issue to the Maryland Court of Appeals, the position of the defendants had been that domicile was the chief issue. This posture was noted by the Supreme Court in *Elkins* in stating that the University "makes domicile the 'paramount' policy consideration." On certification to the Court of Appeals, however, the defendants shifted their position. The clarifying resolution plainly states that the University will not change its policy even given an adverse decision on the Maryland law of domicile. Thus, domicile cannot now really be the paramount issue, since the University has now unquestionably stated that it doesn't feel that it is bound by rulings of the Maryland Court on the law of domicile, but rather is free to define domicile in a more restrictive manner if it so chooses. The defendants' position is that domicile, as defined by the applicable Maryland law, is not now the real concern of the in-state policy.

Both parties have devoted considerable attention in their memoranda to the question of whether or not cost equalization has been advanced by the defendants as a consideration in the University's policy. This is not the precise point which needs to be addressed according to the mandate inherent in the Supreme Court's remand. The question now put before me is whether or not the law of *domicile*, as the term was previously presumed to be defined by the Maryland law of domicile, is the paramount consideration in the University's policy. The clarifying resolution of the University indicates that this is not the position presently taken by the University, in that it now claims the right to construe domicile more narrowly in order to suit its purposes, one of which is cost equalization.

[2] Clearly the University is not bound to use the concept of domicile, as defined by state law, in fashioning its tuition policy. The University, through the Board of Regents, is granted broad general powers by the State to administer and manage the operation of the school in such areas as admission, tuition, and fee policies. *Md. Ed. Code Ann.* § 13-104. While this court does not question the University's authority to act in this fashion, I must

address the effect of its having done so at this late stage in the litigation.

Although the resolution in question is entitled a "clarifying" resolution, it does not clarify but rather alters the University's position on domicile.[14] Under the resolution the University is no longer concerned with the Maryland law of domicile, but rather with its own more limited use of that term.

3. What retroactive effect, if any, should be given the policy change?

[3] The initial policy in question was adopted in September, 1973. The ruling by this court was filed on July 13, 1976, granting injunctive relief to the plaintiffs. That order was stayed, however, pending final outcome on appeal on condition that, should the plaintiffs ultimately prevail, the University would refund to them the difference between in-state and out-of-state charges paid.[15]

The defendants maintain that the plaintiffs' rights have not been adversely affected by the University's change in position and that giving the "clarifying" resolution retroactive effect will not impair the plaintiffs' rights. Defendants base this contention on their perception that the order staying this court's initial injunction order made the plaintiffs' eventual right to any monetary recovery contingent upon a final decision in their favor. Since no final ruling has been entered for the plaintiffs, the defendants claim the plaintiffs have no right to any compensation and will not be prejudiced if the University's regulation is given retroactive effect.

[14] In *Elkins v. Moreno, supra,* at 659, n.8, 98 S. Ct. 1338, the Supreme Court sets out instances in the history of this case up to that point in which the defendants indicated that the basis of the policy was the law of domicile as established and applied by the Maryland courts.

[15] This would still be contingent upon a showing by the individual plaintiff that he or she was, in fact, a domiciliary of Maryland.

The court is not persuaded by the defendants' argument on this point. Until June 23, 1978, the date of the "clarifying" resolution, the purported concern of the University was with the Maryland law of domicile. Given this premise, the Supreme Court found this case to be squarely within *Vlandis* as limited by *Salfi*. *Elkins v. Moreno, supra,* at 660, 98 S. Ct. 1338. Two matters remained for the Supreme Court's decision at that time:

1. Whether, as found by this court, G-4 aliens could be domiciled in Maryland according to state law; and, if this were possible,

2. Whether the court would further limit or overrule *Vlandis* on the facts of this case.

On certification the Maryland Court of Appeals held that G-4 aliens could acquire domicile in Maryland under the applicable state law. Given the interim change in the defendants' position in this case, however, the Supreme Court did not address the question of overruling or further limiting *Vlandis*. Until the June 1978 policy change, in-state eligibility hinged upon a determination of Maryland domicile according to *state law* principles. The Court of Appeals of Maryland having now determined that G-4 aliens may be domiciled in Maryland according to state law, the plaintiffs were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the laws of the state. The rights of the plaintiffs were asserted and matured under the pre June, 1978 policy. Accepting, as this court must do, that the doctrine of *Vlandis v. Kline, supra,* has not been yet discarded by the Supreme Court, the plaintiffs were denied due process. A change in that policy cannot now retroactively deny plaintiffs the benefits to which they were entitled and which had accrued up to that time. *Greene v. United States,* 376 U.S. 149, 84 S. Ct. 615, 11 L. Ed. 2d 576 (1964); *Coe v. Secretary of H.E.W.,* 502 F.2d 1337 (4th Cir. 1974).

4. Is the post June 23, 1978 policy invalid under the Vlandis v. Kline doctrine?

[4] The question which remains is whether the policy, which now purports to be concerned with the University's narrowly construed definition of domicile, still constitutes an impermissible irrebuttable presumption.

In *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), the Court held that a Connecticut statutory definition of "residents" for purpose of fixing tuition at a state university was unconstitutional where the state purported to be concerned with residency yet denied students the opportunity to present facts tending to show they met the test of residency.

In the present posture of this case, the test asserted in the revised In-State Policy is the University's limited definition of domicile, not the generally accepted Maryland law of domicile. The University's definition of the term precludes nonimmigrant aliens from "domiciliary" status. In its present posture, the In-State Policy does not constitute an impermissible irrebuttable presumption. Given the University's definition of domicile, which by its terms excludes nonimmigrant aliens, it is universally true that G-4 aliens cannot qualify for in-state status under that policy. Accordingly, there no longer is an impermissible irrebuttable presumption under the post June 23, 1978 policy.

B. Other Issues

The question still remains whether the revised policy violates the Equal Protection and Supremacy Clauses of the Constitution. A conference will be held with counsel to schedule further proceedings on these points.

United States District Court,
D. Maryland.

Juan Carlos Moreno et al., Plaintiffs,

v.

John S. Toll. President,
University of Maryland, Defendant.
(489 F. Supp. 658 (D. Md. 1980))

Civ. A. No. M-75-691.

MEMORANDUM AND ORDER

(Filed April 17, 1980)

JAMES R. MILLER Jr., District Judge.

This action was filed as a class action challenge[1] to the University of Maryland's "In-State Policy"[2] which precludes non-immigrant aliens from consideration for in-state status while enrolled at the University. The court has already addressed the plaintiffs' due process challenge

[1] The plaintiff class was defined as follows:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

(a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa."

Moreno v. University of Maryland, 420 F. Supp. 541, 564 (D. Md. 1976).

[2] The University of Maryland's In-State Policy makes Maryland domicile the test for granting in-state status to citizens and immigrant aliens. The Policy, along with the Board of Regents' "Clarifying Resolution" of June 23, 1978 expressly precludes consideration of eligibility for in-state status in the case of non-immigrant aliens enrolled at the University.

to the policy.[3] Presently pending before the court are cross motions for summary judgment on the remaining issues raised under the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of the Constitution.

I. The Equal Protection Claims

[1] The plaintiffs' initial argument under the Equal Protection Clause is that the challenged portion of the University's In-State Policy is premised upon a classification based on alienage, and therefore is subject to strict scrutiny in accordance with the Supreme Court decisions in *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), *Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973), *Examining Board v. Flores de Otero*, 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976), and *Nyquist v. Mauclet*, 432 U.S. 1, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977). The defendant, however, contends that strict scrutiny is inappropriate on the following bases:

> (1) The previous Supreme Court cases concerning discrimination against aliens in which a strict scrutiny test was applied all involved a statute or practice which allegedly discriminated against *resident* aliens (a term equated by the defendant with *immigrant* alien);

[3] See the district court decision in *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976), *aff'd* 556 F.2d 573 (4th Cir.), *cert. granted*, 434 U.S. 888, 98 S. Ct. 260, 54 L. Ed. 2d 173 (1977). The Supreme Court, after hearing argument on the case, certified a question of state law to the Maryland Court of Appeals, prior to entering a final order in the case. *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978). Subsequent to the decision by the Maryland Court of Appeals (*Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979)) the Supreme Court remanded the matter to the district court for further consideration due to material changes in the factual posture of the case. *Toll v. Moreno*, 441 U.S. 458, 99 S. Ct. 2044, 60 L. Ed. 2d 354 (1979). On remand, the district court issued an opinion ruling on the remaining due process issues and setting forth the issues remaining for consideration. *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979).

(2) since *immigrant* aliens are eligible for in-state status at the University, it is irrational to contend that the University's policy denies benefits on the basis of alienage;

(3) the rationale for according "suspect" class status is wanting in this case since nonimmigrants can decide to adjust to immigrant visa status;

(4) in-state consideration is not a necessity of life and, therefore, strict scrutiny is inappropriate;

(5) strict scrutiny should not be applicable since the University's policy is consistent with the purposes of federal immigration law; and

(6) in the dissent filed in a prior opinion of the Supreme Court in this case, Justice Rehnquist and Chief Justice Burger indicated that "[t]here . . . would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest." *Elkins v. Moreno,* 435 U.S. 647, 676 n.6 [98 S. Ct. 1338, 1354 n.6., 55 L. Ed. 2d 1338] (1978).

In determining the applicable standard in the present case, it is necessary to review briefly the recent Supreme Court decisions regarding the ability of the State to create legislative classifications on the basis of alienage.

Initially, it is clear that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson, supra,* 403 U.S. at 372, 91 S. Ct. at 1852. Thus, in the *Graham* case, the Supreme Court struck down Pennsylvania and Arizona statutes which denied welfare benefits to resident aliens or to aliens who had not resided in the Univted States for a requisite number of years, as being violative of the Equal Protection Clause. In subsequent cases the Court has expounded upon this doctrine.

For example, in *Examining Board v. Flores de Otero, supra,* Puerto Rico's virtual ban on the private practice of

civil engineering by aliens was held unconstitutional by the Court, stating 426 U.S. at 602, 96 S. Ct. at 2281:

> "[*Graham v. Richardson, supra; Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973); and *In re Griffiths*, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973)] establish that state classifications based on alienage are subject to 'strict judicial scrutiny.' *Graham v. Richardson*, 403 U.S. at 376, 91 S. Ct. at 1854. Statutes containing classifications of this kind will be upheld only if the State or Territory imposing them is able to satisfy the burden of demonstrating 'that its purpose or interest is both constitutionally permissible and substantial; and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.' In *re Griffiths*, 413 U.S. at 721-722, 93 S. Ct. at 2854-2855 (footnotes omitted)."

The Court went on to note that two rationales exist for the principles set forth in these cases.

> "The first, based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment and in the Due Process Clause of the Fifth Amendment, recognizes that '[a]liens as a class are a prime example of a "discrete and insular" minority. . . . for whom . . . heightened judicial solicitude is appropriate.' *Graham v. Richardson*, 403 U.S. at 372, 91 S. Ct. at 1852 . . . The second, grounded in the Supremacy Clause, Const., Art. VI, cl. 2, and in the naturalization power. Art. 1, § 8, cl. 4 recognizes the Federal Government's primary responsibility in the field of immigration and naturalization." (Citations omitted.)

426 U.S. at 602, 96 S. Ct. at 2281.

Similarly, in *Nyquist v. Mauclet*, 432 U.S. 1, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977), the Supreme Court held unconstitutional a New York statute which barred certain resident aliens from eligibility for state financial assist-

ance for higher education.[4] The appellants in *Nyquist* sought to avoid strict scrutiny analysis by the Court by arguing that the state statute in question distingushed "only within the heterogeneous class of aliens and [did] not distinguish between citizens and aliens *vel non*." *Id.* at 8, 97 S. Ct. at 2125. Nevertheless, the Court applied strict scrutiny analysis in striking down the statute, as it stated:

> "The important points are that [the statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."

Id. at 9, 97 S. Ct. at 2125.

As previously mentioned, the defendant's initial and principal argument against the application of the doctrine of strict scrutiny here is premised upon the observation that all prior Supreme Court cases cited have dealt with classifications of "resident" aliens, rather than with "non-immigrant" aliens. Accordingly, the defendant argues that nothing in the prior Supreme Court cases requires the application of strict scrutiny in the examination of state discrimination against nonimmigrant aliens. In support of this contention, the defendant refers the court to G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, Sup. Ct. Rev. 275, 312 (1977), wherein the author states:

> "The Supreme Court . . . has not held it unconstitutional to discriminate against nonimmigrant aliens.

[4] The statute in question in *Nyquist v. Mauclet, supra*, provided as follows:

> "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States." N.Y. Educ. Law § 661(3) (McKinney Supp. 1976).

> It has not even suggested that such aliens are within the class protected under the suspect classification doctrine."

Since no case law is cited in support of the defendant's position,[5] the issue of whether state classifications which narrowly discriminate against nonimmigrant aliens should be examined under strict scrutiny analysis appears to present a novel question of law.

In attempting to distinguish the present case from prior Supreme Court decisions which applied strict scrutiny analysis to classifications of "resident" aliens, *See Graham v. Richardson, supra; Sugarman v. Dougall supra; In re Griffiths, supra; Nyquist v. Mauclet, supra,* the defendant appears to adopt a definition of "resident" alien which excludes a nonimmigrant status from its umbrella. This definition, in turn, appears to have its genesis in the article by Professor Rosberg:

> "As defined in the federal immigration laws, a resident- or immigrant-alien is a person admitted for permanent residence, entitled to work and live anywhere in the country and eligible for naturalization after five years of residence. A non-resident- or

[5] The court and the parties have found no case which addresses this issue. The defendant, however, does refer this court to the cases of *Shames v. State of Nebraska,* 323 F. Supp. 1321 (D. Neb. 1971), *aff'd* 408 U.S. 901, 92 S. Ct. 2478, 33 L. Ed. 2d 321 (1972); *DeTenorio v. Lightsey,* 589 F.2d 911 (5th Cir. 1979), *cert. den.* ___ U.S. ___, 100 S. Ct. 59, 62 L. Ed. 2d 39 (1979); and *Hernandez v. Houston Independent School District,* 558 S.W.2d 121 (Tex. Civ. App. 1977) in support of his position. These cases, however, are unpersuasive on this particular issue, in that both *Shames* and *DeTenorio* concern state statutes limiting the rights of *nonresident* aliens, *i.e.* those living in foreign countries, to inherit property in the United States, and *Hernandez* deals with a Texas statute denying free education to *illegal* aliens. The defendant also cites *Mathews v. Diaz,* 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976), but that case specifically deals with the rights of Congress to create legislative classifications based on alienage. *Mathews,* therefore, does not address the issue of the state's power to discriminate on the basis of alienage.

> nonimmigrant-alien is a person admitted for a fixed period of time determined prior to entry . . . No amount of residence will make a nonimmigrant eligible for naturalization."

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government, supra* at 277. Under Professor Rosberg's analysis, the terms "immigrant" and "resident" are synonymous, as are the terms "nonimmigrant" and "nonresident". This court, however, has concluded that this definition of these terms is erroneous, both in light of the definitions contained in the Immigration and Nationality Act itself and of usage of the terms in relevant case law.

The Immigration and Nationality Act defines the term "residence" as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 1482 and 1484 of this title[6] where there is continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

8 U.S.C. § 1101(a)(33).

Under this definition a "resident" alien is one whose place of general abode is within the United States. Resident aliens can, therefore, be further classified as either "immigrant" or "nonimmigrant", the chief basis for the distinction between the two being the statutory recognition of temporal limits inherent in nonimmigrant status. Immigrant aliens are referred to as being "lawfully admitted for permanent residence", i.e. being "accorded

[6] 8 U.S.C. § 1482 deals with the circumstances under which dual nationals will lose their United States citizenship due to continued residence in a foreign state of birth.

8 U.S.C. § 1484 deals with the circumstances under which a naturalized national may lose his United States citizenship due to continuous residence in a foreign state.

the privilege of residing *permanently* in the United States." 8 U.S.C. § 1101(a)(20). Nonimmigrant aliens, by contrast, are admitted for temporary residence.[7] Nonimmigrant aliens are ineligible to become naturalized citizens, because they are not admitted for permanent residence in accordance with the statutory requirements. *See* 8 U.S.C. § 1427(a). Nonimmigrant aliens may, however, be classified as resident aliens if their principal dwelling place is within the United States.[8] Thus the court

[7] Nonimmigrant aliens do not constitute a homogeneous class. The statute lists 12 separate categories of aliens who qualify for classification as nonimmigrants. See 8 U.S.C. § 1101(a)(15)(A)-(L). Each category accords special immigration treatment to a classification of aliens in recognition of their specialized purpose or function in coming to the United States. Nonimmigrant aliens are exempted from the numerical limitations which are placed upon the entry of immigrant aliens. Accordingly, aliens seeking admission are deemed to be immigrants unless they can prove that they fall within one of the statutorily defined nonimmigrant classifications. 8 U.S.C. § 1184(b).

[8] This proposition is supported by negative inferences derived from Supreme Court cases which have discussed the rights of nonresident aliens. Although the term "nonresident alien" is not specifically defined by statute, the Supreme Court has repeatedly used the term in reference to aliens living outside the United States. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972); *Gorun v. Fall*, 393 U.S. 398, 89 S. Ct. 678, 21 L. Ed. 2d 628 (1969); *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968); *Incres Steamship Co., Ltd. v. International Maritime Workers Union*, 372 U.S. 24, 83 S. Ct. 611, 9 L. Ed. 2d 557 (1963); *Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961); *Mackey v. Mendoza-Martinez*, 362 U.S. 384, 80 S. Ct. 785, 4 L. Ed. 2d 812 (1960); *Jay v. Boyd*, 351 U.S. 345, 76 S. Ct. 919, 100 L. Ed. 1242 (1956); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 (1953); *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950); *Commissioner v. Wodehouse*, 337 U.S. 369, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949); *Clark v. Allen*, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947). These cases support this court's conclusion that the terms "resident" and "nonresident" alien as used by the Supreme Court in the past, refer solely to the question of whether the alien is present and dwelling in fact in the United States and not to the alien's status as immigrant or nonimmigrant. 8 U.S.C. § 1101(a)(33).

finds that the term "resident alien", as used in prior Supreme Court decisions dealing with the state's power to classify on the basis of alienage, means those aliens, either immigrant or nonimmigrant, who maintain their place of general abode within the United States.

Given the above definition of "resident alien", the defendant's position presumably is that the prior Supreme Court cases mandate that strict scrutiny analysis be applied in cases of state classifications which discriminate broadly against resident aliens, but that the Court has not yet addressed the question of discriminate classifications of an identifiable subclass of resident aliens, i.e. nonimmigrant aliens.

The chief factor which distinguishes nonimmigrant resident aliens from other resident aliens is that nonimmigrants are admitted only as "temporary" residents of the United States. Accordingly, regardless of the duration of a nonimmigrant's residence in this country, he is ineligible for citizenship unless he changes his visa status to that of an alien admitted for permanent residence, i.e. an immigrant alien. Nonimmigrant aliens, therefore, have a lesser degree of national affinity than immigrant aliens since the former will not, as a matter of course, become eligible for citizenship. This fact, however, is an insufficient justification for allowing the states greater latitude to discriminate against nonimmigrant aliens. As was stated by the Supreme Court in *Nyquist v. Mauclet, supra* 432 U.S. at 10, 97 S. Ct. at 2126:

> "The first purpose offered by the appellants, directed to what they describe as some 'degree of national affinity' . . .[9] is not a permissible one for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."

[9] As previously set forth in note 4, the statute under consideration in *Nyquist* only discriminated against resident aliens who had not applied for citizenship, or if not qualified for citizenship, would not submit a statement affirming an intent to become a citizen when qualified.

The fact that nonimmigrant aliens may not acquire citizenship in the United States is a fact which is exclusively controlled by Congress. Therefore, a state has no power to place additional burdens on nonimmigrants solely on the basis of their visa status as dictated by Congress.

The court concludes that the Supreme Court cases cited have in principle wrapped all resident aliens, both immigrant and nonimmigrant, in the suspect classification blanket. The judicial protection accorded to aliens as a suspect class was based upon a recognition that aliens constitute a "discrete and insular minority" for whom "heightened judicial solicitude is appropriate". *See, Graham v. Richardson, supra* 403 U.S. at 372, 91 S. Ct. at 1852. This treatment is seemingly premised on the aliens' minority status in the community, not their potential citizen status. Accordingly, the court believes that existing case law demands that states justify discriminate classifications of resident aliens, whether immigrant or nonimmigrant, under a strict scrutiny standard.[10]

[2] The defendant has presented the court with several additional alternate arguments against the application of strict scrutiny analysis in this case. First, the defendant stresses that the In-State Policy does not discriminate against all aliens,[11] in that it only precludes consideration for in-state status to all nonimmigrant aliens. This fact, however, is unimportant, for as the Court stated in *Nyquist*, the relevant facts in determining that strict scrutiny should apply are that the policy is directed at aliens, albeit only the subclass of nonimmigrant aliens in

[10] The one exception to this principle is the "governmental functions" doctrine which will be discussed *infra* in connection with the Supreme Court decision in *Foley v. Connelie*, 435 U.S. 291, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978).

[11] The mere fact that some aliens do obtain In-State status consideration under the policy does not imply that the policy should not still be subject to strict scrutiny. As *Nyquist* indicated, the test is whether the policy impermissibly discriminates against aliens, not necessarily whether it discriminates against all aliens.

the present case, and that only aliens are harmed by the policy. The subclass of nonimmigrant aliens seemingly constitutes a "discrete and insular minority for whom judicial solicitude is appropriate," *Graham v. Richardson, supra* at 372, 91 S. Ct. at 1852, since their nonimmigrant status is dictated by federal law. *Cf.* 8 U.S.C. § 1101(a)(15).[12]

The defendant also argues that the University's policy harms not only aliens but that it also denies in-state preference to out-of-state students. (*See* Paper 42, p. 4). This argument, however, is unpersuasive since the policy subjects all citizens and immigrant aliens to a domicile test in order to qualify for in-state benefits whereas nonimmigrant aliens are precluded from qualifying under the same test. The fact that one of the effects of the statute is to deny in-state status to out-of-state students is immaterial in determining whether the policy denies equal protection to nonimmigrant aliens who reside within the state. The policy is naturally based on the premise that in-state status should only be granted to persons who reside within the state. The question, therefore, is whether the policy denies equal protection to nonimmigrants as a "discreet and insular" minority of state residents. It appears to do so.

[3] The defendant also seeks to avoid strict scrutiny analysis by claiming that the benefit sought is not a "necessity of life." The defendant cites the recent Supreme Court opinion in *Foley v. Connelie,* 435 U.S. 291, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978). In this context, however, the

[12] The fact that a nonimmigrant alien may opt to adjust his immigration status to that of a permanent alien does not redeem the University's Policy. In *Nyquist,* the statute challenged provided that aliens would be eligible for the educational loans in question if they either applied to become United States citizens or submitted a statement of intent to apply for citizenship when eligible. The *Nyquist* court struck down the statute, despite the fact that those challenging the statute could have qualified for the loans they sought merely by deciding to apply for citizenship. *Nyquist v. Mauclet, supra,* 432 U.S. at 11, 97 S. Ct. at 2126.

defendant's reliance on *Foley* is misplaced. In *Foley*, the Court upheld a New York statute limiting appointment to the state police force to United States citizens by applying a rational basis, rather than a strict scrutiny, test. The application of this less demanding standard, however, was clearly limited to alienage classifications in matters involving the state's "historical power to exclude aliens from participation in its democratic political institutions." *Id.* at 295, 98 S. Ct. at 1070. As the Court stated:

> "The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."

Id. at 297, 98 S. Ct. at 1071. The defendant would have the court construe this statement to mean that strict scrutiny should only apply to the "necessities of life", such as those indicated. Taken in context, however, it is apparent that the case stands for a limited exception to the general strict scrutiny standard, and that the exception will apply only in cases involving state regulation of one of the basic functions of government. This meaning is apparent in light of the Court's later decision in *Ambach v. Norwick*, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979), where it stated:

> "The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."

Id. at 75, 99 S. Ct. at 1593. Thus the strict scrutiny approach is generally applicable to State classifications based on alienage, excepting those dealing with governmental functions in which cases the less stringent rational basis test will be applied.

Given the above considerations, the Court finds that strict scrutiny is the applicable test in examining the constitutionality of the University's In-State Policy.[13] Accordingly, the statute may be upheld only if the defendant satisfies the burden of demonstrating that:

> "[the policy's] purpose of interest is both constitutionally permissible and substantial, and that [the State's] use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest."

Examining Board v. Flores de Otero, supra, 426 U.S. at 602, 96 S. Ct. at 2281 (citing *In re Griffiths, supra* 413 U.S. at 721-722, 93 S. Ct. at 2854-2855).

[4] The defendant's Memorandum in support of his Motion for Summary Judgment (Paper 36) discusses the interests served by the In-State Policy in terms of a rational basis standard, rather than a strict scrutiny standard.[14] The purposes purportedly served by the Policy have been set forth by the defendant as follows:

> (1) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;
>
> (2) achieving equalization, between the affected classes, of the expenses of providing educational services;
>
> (3) efficiently administering the University's in-state determination and appeals process; and

[13] The defendant's argument that Justice Rehnquist and Chief Justice Burger have already indicated that *Nyquist* is not controlling in the present case is unpersuasive, as this statement was merely dicta in a dissenting opinion. Further, the court notes that both Justices filed dissents in *Nyquist.*

[14] The plaintiffs have noted that the defendant conceded in his brief to the Court of Appeals for the Fourth Circuit that the University's policy "will not withstand a 'strict scrutiny' Equal Protection standard." (Br. at 32).

(4) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

Although these factors would arguably constitute a sufficient justification for the University's policy under a rational basis analysis, they fail to meet the high burden which the defendant faces under a strict scrutiny standard.

Citizens and immigrant aliens do not necessarily have a "closer affinity" to the State than do nonimmigrant aliens. This is particularly apparent in the context of this case, since it has already been determined that, as a matter of both federal and state law, G-4 nonimmigrant aliens are capable of acquiring domicile in the state of Maryland. In addition, the state affinity rationalization was specifically considered and rejected by the Supreme Court in *Nyquist v. Mauclet, supra.*

Similarly, cost equalization is an insufficient justification for the University's policy. As this court has previously noted:

> "Nonimmigrant aliens, even those such as plaintiffs' fathers whose salaries are exempt from state income tax, who have resided in Maryland for 10 or 15 years, as have plaintiffs' fathers, might well have contributed far more financial support to the University of Maryland through payment of real property, sales and other taxes than would have a student, financially independent for at least 12 months, who maintained a domicile in Maryland for 6 months prior to his class registration. Yet such a student, who conceivably could have contributed almost nothing to the Maryland tax base, is allowed to prove Maryland domicile under the 'In-State Policy.'"

Moreno v. University of Maryland, 420 F. Supp. at 560.[15]

[15] Cost equalization is the most persuasive rationale set forth by the defendant in support of the Policy. As summarized by the defendant, the contention is as follows:

> "The University's requirement that nonresidents and nonimmigrants pay out-of-state rates bears a rational

The rationalization that the preclusion of nonimmigrants promotes the efficient administration of the University's policy is patently insufficient under a strict scrutiny analysis. *Cf. Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267, 94 S. Ct. 1076, 1086, 39 L. Ed. 2d 306 (1974). It is apparent that the University already has an administrative procedure through which eligibility for in-state status may be determined on a case-by-case basis when necessary. Thus any questions of in-state eligibility for nonimmigrants could easily be processed through the University's existing administrative procedures. The fact that this would result in an increased cost to the University is an insufficient justification for the Policy. *Sugarman v. Dougall, supra* 413 U.S. at 646, 93 S. Ct. at 2849.

Finally, the University's rationalization that the present policy prevents disparate treatment among categories of nonimmigrant aliens is not persuasive. If that portion of the University's policy which limits consideration for in-state eligibility to citizens and immigrant aliens were stricken, then nonimmigrant aliens would be uniformly eligible for consideration for in-state status under the terms of the policy applicable to citizens and aliens alike. The fact that certain categories of nonimmigrants would,

relationship to the State's purpose of financing, operating, and maintaining the University of Maryland. In addition, the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.*, nonimmigrants and other nonresidents." (Paper 36, p. 16-17).

As the defendant's argument implies, however, and as was previously conceded in the defendant's Brief to the Fourth Circuit Court of Appeals, although this argument would be sufficient under a rational basis analysis, it is insufficient under a strict scrutiny standard. Under a strict scrutiny test it is incumbent upon the State to show that its interest is constitutionally permissible and substantial and that the questioned classification is necessary to the fulfillment of that interest. *See, Examining Board v. Flores de Otero, supra.*

as a matter of law, prove to be ineligible for in-state treatment is an insufficient basis for precluding consideration of those who could otherwise qualify under the terms of the policy.

For the foregoing reasons, the Court finds that the University of Maryland's In-State Policy violates the Equal Protection Clause of the Fourteenth Amendment to the extent that it denies nonimmigrant aliens consideration for eligibility for in-state status.

II. *The Supremacy Clause Claims*

The plaintiffs contend that the University's In-State Policy violates the Supremacy Clause on two grounds. First, the plaintiffs claim that the Policy conflicts with international agreements entered into by the United States. Second, the plaintiffs argue that the Policy conflicts with the exclusive authority of Congress over immigration.

A. Interference With International Agreements

[5] The substance of the plaintiffs' contention on this ground is that the University's Policy conflicts with the international agreements entered into by the United States which establish the international organizations employing the plaintiffs' fathers in this country. Specifically, the plaintiffs contend that the Policy interferes with the provisions in the international agreements which preclude both Federal and State taxation of the salaries paid to non-American employees of the designated organizations. The purported conflict with these agreements stems from the fact that one of the University's express justifications for the Policy is to promote cost equalization for those individuals subject to the full spectrum of Maryland taxes. Thus, largely because the plaintiffs' fathers are not subject to the state income tax, they are not accorded the benefits derived from in-state classification.

The defendant maintains that there is no direct conflict between the University's Policy and the international agreements referred to by the plaintiff. The only arguable conflict which exists is between one of the rationales advanced in support of the University's Policy and the income tax exemptions granted by the international agreements. The defendant contends that this is insufficient evidence of an impermissible conflict under the Supremacy Clause.

[6] As stated by the Supreme Court in *DeCanas v. Bica*, 424 U.S. 351, 357 n.5, 96 S. Ct. 933, 937 n.5, 47 L. Ed. 2d 43 (1976), "the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties." An indirect or hypothetical conflict is insufficient, however, to render invalid a state statute or policy, for the Supreme Court has stated that the reserved powers of the State "should be respected unless there is a *clear collision* with a national law which has the right of way under the Supremacy Clause of Article VI." *Kesler v. Dept. of Public Safety*, 369 U.S. 153, 172, 82 S. Ct. 807, 818, 7 L. Ed. 2d 641 (1962) (Emphasis added). *Cf., Seagram & Sons v. Hostetter*, 384 U.S. 35, 45, 86 S. Ct. 1254, 1260, 16 L. Ed. 2d 336 (1966); *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446, 80 S. Ct. 813, 817, 4 L. Ed. 2d 852 (1960).

In this case it is apparent that there is no "clear conflict" between the policies in question. The University's Policy seeks to confer certain economic benefits on individuals closely affiliated with the State of Maryland. The mere fact that one of the factors which is considered in determining eligibility for this benefit is whether or not the applicant's income is taxed by Maryland does not necessarily imply that the policy conflicts with the tax policies contained in the relevant international agreements. The "conflict" between these policies, in and of itself, is too attenuated to warrant invalidating the University's Policy.

B. Interference With Congress' Exclusive Control Over Immigration.

[7] The plaintiffs contend that the University's Policy violates the Supremacy Clause in that it encroaches upon the exclusive federal power over immigration and naturalization. The defendant, however, maintains that the Policy falls within the range of discretion afforded to states in dealing with aliens within their borders.

Initially, as the Supreme Court noted in *DeCanas v. Bica*, 424 U.S. 351, 355, 96 S. Ct. 933, 936, 47 L. Ed. 2d 43 (1966):

> ". . . the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by [the] constitutional power [to regulate immigration], whether latent or exercised."

The Court went on to explain that a regulation of immigration "is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.*

Similarly, as the Court stated in *Examining Board v. Flores de Otero, supra* 426 U.S. at 604-605, 96 S. Ct. at 2282:

> "We do not suggest, however, that a State, Territory, or local government, or certainly the Federal government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens. *In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.*" (Emphasis supplied).

As this section of the Court's opinion indicates, the standard utilized to uphold a state regulation dealing with benefits to be accorded to aliens is essentially the strict scrutiny analysis previously discussed in reference to the Equal Protection arguments. Thus, for the reasons previously set forth, the defendant has failed to meet the high burden required in order to justify the discriminatory treatment of nonimmigrant aliens under the University's Policy. This court, therefore, finds the Policy to be unconstitutional under both the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of the Constitution.[16]

III. *Conclusion*

Accordingly it is ORDERED this 17th day of April, 1980 by the United States District Court for the District of Maryland, that the plaintiffs' Motion for Summary Judgment is hereby GRANTED and the defendant's Motion for Summary Judgment is hereby DENIED.

[16] The court specifically notes that this decision does not require that domicile, as defined under state law, be the test for determining eligibility for in-state status at the University of Maryland. The only matter which the Court has decided is that the standards which the University utilizes in determining in-state eligibility must either be uniformly applied to all citizens and resident aliens, or else any discriminate treatment of aliens must withstand strict scrutiny analysis, as set forth in this opinion, in order to be upheld.

In The United States District Court
For The District of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, et al.

Plaintiffs,

v.

John S. Toll, President
University of Maryland,

Defendant.

ORDER

(Filed May 30, 1980)

For the reasons stated in the Court's Memorandum Opinion of October 31, 1979, 480 F. Supp. 1116 (D. Md. 1979), and in the court's Memorandum Opinion filed on April 17, 1980, it is this 30th day of May, 1980, hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That the University of Maryland's "In-State Policy", as enforced prior to June 23, 1978, which denied G-4 aliens the opportunity to establish "In-State" status through the use of an irrebuttable presumption of non-domicile, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment;

2. That the University of Maryland's "In-State Policy", as enforced on, before, and after June 23, 1978, which denies G-4 aliens the opportunity to establish "In-State" status, is unconstitutional as it is in violation of the Equal Protection Clause of The Fourteenth Amendment and the Supremacy Clause;

3. That the court's Order of July 13, 1976, 420 F. Supp. 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy" prior to June 23, 1978;

4. The court's Order of July 13, 1976, 420 F. Supp. 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy", as applied after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the Memorandum Opinion of April 17, 1980, and Paragraph 2 of this Order.

5. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's "In-State Policy" as it was in effect prior to June 23, 1978, or as it has been in effect subsequent to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to "In-State" status for purposes of tuition and charge differential determinations;

6. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the date of this order, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's order of July 13, 1976, had been immediately effective, including interest at the legal rate.

7. For purposes of paragraph numbered 6 of this Order, the determination of which members of the subclass would have been granted reclassification to "In-State" status but for the stay pending appeal shall be based on the following determination of domicile: Whether, for each term in which such student was enrolled at the University during

the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles, as reflected in paragraph 3 of the Application Section of the "In-State Policy", for six consecutive months prior to the beginning of that semester;

8. In making the determination of domicile required by Paragraph 7 of this Order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland solely on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party;

9. The court reserves the question of court costs and attorneys' fees.

JAMES R. MILLER, JR.,
United States District Judge.

In The United States District Court
For The District Of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg
and
Renee Otero, Jr.

Plaintiffs.

v.

University of Maryland
John S. Toll, President, University of Maryland

JUDGMENT

(Filed May 30, 1980)

In accordance with the Opinion dated July 13, 1976 and the Memorandum and Order dated April 17, 1980 and Order dated May 30, 1980 and filed in the above entitled case, it is

ORDERED and ADJUDGED: THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF PLAINTIFFS AGAINST DEFENDANTS.

Dated at Baltimore, Maryland this 30th day of May, 1980.

PAUL R. SCHLITZ,
Clerk.

By: RON LAWSON
DEPUTY CLERK.

In The United States District Court
For The District Of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, et al.

Plaintiffs

v.

John S. Toll, President,
University of Maryland

Defendant

ORDER

(Filed May 30, 1980)

The Court having read and considered the Motion To Stay Order Pending Appeal, filed on May 30, 1980, on behalf of John S. Toll, President, University of Maryland, the defendant above named;

And the Court having heard argument of counsel for the respective parties in chambers on May 30, 1980, at which time it was represented by counsel for the defendant Toll that were a stay granted the University of Maryland, for the fall 1980 semester and any other semester that commences before the appellate process is concluded, as to each student whose status is currently determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1980 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay, would refund the difference in tuition and other charges between the "out-of-state"

charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's order of May 30, 1980, were finally affirmed on appeal;

And the Court having determined from the foregoing pleading, arguments, and representation that the prerequisites for the granting of a stay pending appeal, stated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), have been satisfied;

IT IS, this 2nd day of June, 1980, by the United States District Court for the District of Maryland, hereby

ORDERED that the Motion To Stay Order Pending Appeal be granted as prayed and that the effectiveness of the Court's order filed May 30, 1980, be, and the same hereby is, STAYED.

JAMES R. MILLER, JR.
United States District Judge.

In The United States District Court
For The District Of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg
and
Renee Otero, Jr.

v.

University of Maryland
John S. Toll, President, University of Maryland

AMENDED JUDGMENT

(Filed June 24, 1980)

In accordance with the Opinion dated July 13, 1976 and Memorandum and Order dated April 17, 1980 and Order dated May 30, 1980 and filed in the above entitled case, it is

ORDERED AND ADJUDGED:

(1) THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF DEFENDANT, UNIVERSITY OF MARYLAND, AGAINST PLAINTIFFS.

(2) THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF THE PLAINTIFFS AGAINST DEFENDANT, JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND.

Dated at Baltimore, Maryland, this 24th day of JUNE, 1980.

PAUL R. SCHLITZ,
Clerk.

JAMES R. MILLER, JR., JUDGE,
United States District Court.

OPINION
(Filed July 13, 1976)

United States District Court,
D. Maryland.

Civ. A. No. M-75-691

Juan Carlos Moreno et al.,
Plaintiffs,

v.

University of Maryland and
Dr. Wilson H. Elkins, President,
University of Maryland,
Defendants.

(420 F. Supp. 541)

JAMES R. MILLER, Jr., District Judge.

Opinion and Order

This is a purported class action suit in which the named plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, seek declaratory and injunctive relief against the defendants, the University of Maryland and Dr. Wilson H. Elkins, its president. Both sides have filed motions for summary judgment. The named plaintiffs are currently students at the University of Maryland, College Park campus, who reside in the State of Maryland with their parents, upon whom they are financially dependent. Plaintiffs' fathers all hold nonimmigrant alien visas issued pursuant to 8 U.S.C.A. § 1101(a)(15)(G)(iv)[1] [G-4 visas].

[1] Title 8, U.S.C., § 1101(a)(15)(G)(iv) defines as one class of non-immigrant alien those aliens who are "officers, or employees of such international organizations [those entitled

As employees of certain international organizations created under international agreements to which the United States is a party, the plaintiffs' fathers are exempted from state and federal taxes on salaries paid by these organizations.[2]

Under policies adopted by the Board of Regents of the University of Maryland effective for any term of the University beginning on or after January 1, 1974, (hereinafter referred to as the "In-State Policy"), students are divided into two classes, i.e., "in-state" or resident on the one hand and "out-of-state" or non-resident on the other, for purposes of determining admission, tuition rates, and charge differentials. Under this policy "out-of-state" undergraduate students are required to pay $1,260 more per year for tuition than "resident" students, as well as $100 more per year for a room. "Out-of-state" graduate students are charged $30 more per credit hour than "in-state" students.

The relevant sections of the "In-State-Policy" are as follows:

> *"General Policy*
>
> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to *immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States,* in the following cases:

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to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669)], and the members of their immediate families."

[2] *See* Art. VII, § 9(b) of the Articles of Agreement of the International Bank for Reconstruction and Development (12/27/45), 60 Stat. 1440, T.I.A.S. No. 1502, as amended Dec. 16, 1965, 16 U.S.T. 1942, T.I.A.S. No. 5929 and Art. XI § 9(b) of the Agreement Establishing the Inter-American Development Bank, (4/8/59), 10 U.S.T. 3029, T.I.A.S. No. 4397. Plaintiff Clare Hogg's father is employed by the former organization usually referred to as the World Bank; the fathers of the other two named plaintiffs are employed by the latter organization.

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester. (Emphasis added).

* * * * * *

"2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge differential purposes in all other cases.

* * * * * *

"Definitions

"1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

* * * * * *

"4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time. . . ."

There are eight criteria which under the "In-State-Policy" "the University shall take into consideration, but shall not be limited to . . ." in determining whether Maryland domicile has been established. These criteria, applied to the individual upon whom the determination of domicile depends, are whether the individual:

a. Owns or rents and occupies real property in Maryland as his (her) domicile on a year-round basis.

b. Maintains a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintains within the State of Maryland all or substantially all personal possessions.

d. *Pays Maryland income tax on all earned income* including taxable income earned outside the State.

e. Registers all owned motor vehicles in Maryland.

f. Possesses a valid Maryland driver's license, if licensed.

g. Registers to vote in Maryland, if registered.

h. Gives a Maryland home address on federal and state income tax forms.

(Attachment to Defendant's Answer to Plaintiffs' Request for Admissions of Fact, with emphasis added.).

The University determined that the three named plaintiffs were not entitled to "instate" status. The determination was predicated upon a conclusion that the parent on whom each was financially dependent could not be domiciled in Maryland because each was in the country on a G-4 visa. Without success, all three plaintiffs availed themselves of the three-step appellate process provided by the University to students dissatisfied with their residence classification.[3]

[3] The "In-State Policy" provides that:

"A student who disagrees with his classification may request a personal interview with a classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee

The pertinent facts with respect to each of the individual plaintiffs are alleged as follows:

> "Plaintiff Moreno's father, Mr. Manuel A. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Manuel Moreno has owned a home in Maryland for the past twelve years. Plaintiff Moreno's mother, Mrs. Gladys M. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa. Manuel and Gladys Moreno own no property in Paraguay, having sold the house which they formerly owned there in 1960. Manuel and Gladys Moreno have paid all Maryland State and Montgomery County property taxes on their home as well as all state and local retail, motor vehicle, fuel, excise and other taxes applicable to them as required by law. Manuel and Gladys Moreno each hold a Maryland driver's license; their automobiles are registered in Maryland. Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years; they have no present intention to reside anywhere other than in the State of Maryland."
>
> (Paper No. 1, Verified Complaint, ¶ 16).
>
> "Plaintiff Moreno has lived with his parents since birth. He has lived in the United States since the age of four, has attended primary and secondary schools in the United States without interruption, and graduated from high school in Maryland. Plaintiff Moreno is a citizen of Paraguay; he now holds a G-4 visa. He holds a Maryland driver's license. He has filed United States and Maryland income tax returns for 1973 and 1974. Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years; he has no present intention to reside anywhere other than in the State of Maryland."

(IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final."

(*Id.*, ¶18).

"Plaintiff Otero's father, Mr. Rene Otero, is a citizen of Bolivia and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Plaintiff Otero's mother, Mrs. Teresa Bailey Otero, is a citizen of the United States; she is registered to vote in Maryland. Rene and Teresa Otero resided in the District of Columbia from the time of their arrival in the United States in 1960 until 1965, when they moved to Maryland. Rene and Teresa Otero have owned a home in Maryland since 1965 and have resided therein for ten years; they have paid all Maryland State and Montgomery County property taxes thereon as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Rene and Teresa Otero each hold a Maryland driver's license; Rene Otero's automobile is registered in Maryland. Rene and Teresa Otero own no property in Bolivia. Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years; they have no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶21).

"Plaintiff Otero has lived with his parents since birth. He has lived in the United States since the age of five and has attended primary schools, seconday schools, and college in the United States without interruption. Plaintiff Otero is a citizen of Bolivia; he now holds a G-4 visa; he has made application to adjust his status to that of immigrant. Plaintiff Otero holds a Maryland driver's license. Plaintiff Otero has filed both United States and Maryland income tax returns in 1972, 1973, and 1974, and he has paid income tax to both Maryland and the United States in each of those three years. Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years; he has no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 23).

"Plaintiff [Clare B.] Hogg's father, Mr. Vincent Hogg, is a citizen of the United Kingdom and is the holder of a G-4 visa; he has been employed by the International Bank for Reconstruction and Development for thirteen years. Plaintiff Hogg's mother, Mrs. Barbara Hogg, and the Hoggs' daughter Susan are citizens of the United Kingdom. Susan Hogg married a United States citizen in 1973 and adjusted her status to that of permanent resident alien. Vincent and Barbara Hogg resided in the District of Columbia from the time of their arrival in the United States in 1962 until 1970, when they moved to Maryland. They have resided in Maryland for five years except as described below. Vincent and Barbara Hogg own their own home in Maryland as well as a house in which they formerly resided in the District; the house in the District is rented. Vincent and Barbara Hogg own no real property in the United Kingdom with the exception of a small condominium apartment which is currently listed for sale with a real estate agent and which it is their present intention to sell as soon as a sale can be consummated. Substantially all of their personal property and investments are here in the United States with the exception of a bank account in a sum equivalent to approximately five hundred dollars maintained by Vincent Hogg in the United Kingdom for the convenience of paying life insurance premiums and professional journal subscriptions; he does not make payments to the United Kingdom's State Pension Fund. Vincent Hogg's will was written in the United States and represents that he resides in Maryland. Vincent Hogg's automobiles are registered in Maryland. Vincent and Barbara Hogg each hold a Maryland driver's license. They belong to the local civic association in the area in which they reside. Vincent and Babara Hogg have filed joint United States income tax returns every year since 1963. In 1974 they paid income taxes to both the United States and to the State of Maryland on all income other than Mr. Hogg's salary from the

International Bank for Reconstruction and Development, as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period abroad of approximately nine months as part of Vincent Hogg's employment; they have no intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 26).

"Plaintiff Hogg has resided with her parents since birth. She has lived in the United States since the age of seven and has attended primary schools, secondary school, and college in the United States without interruption, with the exception of the approximately nine-month period described in paragraph 26 above. Plaintiff Hogg is a citizen of the United Kingdom; she now holds a G-4 visa; she holds a Maryland driver's license. Plaintiff Hogg has filed both United States and Maryland income tax returns in 1973 and 1974. Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in [the above paragraph]; she has no present intention to reside anywhere other than in the State of Maryland."

(*Id.*, ¶ 28).

Plaintiffs claim the actions of defendants in denying them "in-state" status are in violation of the Due Process, Equal Protection and Supremacy Clauses of the Constitution. They seek to enjoin the defendants from failing to reclassify them as students having "in-state" status and to enjoin the defendants from denying to any student "in-state" status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent either holds a G-4 visa or pays no Maryland State income tax pursuant to an international agreement to

which the United States is a party on wages paid by an international organization.

Defendants have moved for summary judgment on various jurisdictional and procedural grounds, as well as on the merits of the case.

I. Jurisdiction

Defendants' initial argument is that this court lacks subject matter jurisdiction under 28 U.S.C. § 1343(3) or (4)[4] because plaintiffs' claim is founded upon the Maryland law of domicile and presents no federal question:

> "Plaintiffs' cause of action and the core of their grievance does not present a deprivation by the Defendants of a federal statutory or constitutional right, privilege or immunity, but rather, rests upon an interpretation of the Maryland definition of domicile." (Memorandum in Support of Defendants' Motion For Summary Judgment, at p. 10).

[1] Plaintiffs filed this suit pursuant to, *inter alia,* 42 U.S.C. § 1983 which authorizes a "suit in equity" against a "person" to redress "the deprivation" under color of any State regulation "of any rights, privileges, or immunities secured by the Constitution" to any "person within the jurisdiction" of the United States. This section creates a federal cause of action but it does not by itself confer jurisdiction on federal district courts to adjudicate claims brought pursuant to it. The jurisdictional counterpart of 42 U.S.C. § 1983 is 28

[4] Title 28, U.S.C., § 1343 provides that the district courts have jurisdiction of any civil action authorized by law to be commenced by any person:

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

U.S.C. § 1343. *Hagans v. Lavine,* 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). Jurisdiction under § 1343(3) exists at least for deprivations by state officials of rights "secured by the Constitution of the United States."[5] Jurisdiction exists in this court under § 1343 (3) if a constitutional claim of sufficient substance has been raised by the § 1983 cause of action. *Hagans v. Lavine, supra.*

[2] Plaintiffs' § 1983 claim is premised on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Contrary to defendants' assertions, it is not the Maryland law of domicile which gives rise to this suit, but rather the "In-State Policy" of the University of Maryland which has been interpreted by the defendants as automatically classifying holders of G-4 visas as non-residents for purposes of tuition, on the assumption that no one in the United States on a G-4 visa can ever have the requisite intent to establish a Maryland domicile. The due process claim, premised on an argument that the University of Maryland's policy establishes an irrebutable presumption with respect to residence and domicile for tuition purposes similar to that struck down in *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), and the equal protection claim, based on an alleged violation of both the strict scrutiny and the reasonable basis-rational relationship tests, are at the heart of this case. These are matters of federal law. Moreover, these claims are not so insubstantial as to warrant dismissal for lack of subject matter jurisdiction. Such dismissal could be granted only as to claims "absolutely devoid of merit," *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579, 24 S. Ct. 553, 48 L. Ed. 795 (1904); "wholly insubstantial,"

[5] Whether the jurisdictional scope of § 1343(3) is fully coextensive with the substantive provisions of § 1983, so that § 1343(3) would provide jurisdiction for any suit premised on the deprivation under color of state law of a right secured by any Act of Congress is a question not yet decided by the Supreme Court, *Hagans v. Lavine, supra,* at 534 note 5, 94 S. Ct. 1372, but the Fourth Circuit has so held. *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974).

Bailey v. Patterson, 369 U.S. 31, 33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962); "obviously frivolous,"*Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S. Ct. 326, 54 L. Ed. 482 (1910); or "no longer open to discussion," *McGilvra v. Ross*, 215 U.S. 70, 80, 30 S. Ct. 27, 54 L. Ed. 95 (1909). *See also Hagans v. Lavine, supra, Baker v. Carr*, 369 U.S. 186, 198-204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

The claims in this case are clearly not insubstantial. *See Vlandis v. Kline, supra; Hooban v. Boling*, 503 F.2d 648 (6th Cir. 1974); *Klem v. Carlson*, 473 F.2d 1267 (6th Cir. 1973); *Jagnandan v. Giles*, 379 F. Supp. 1178 (N.D. Miss. 1974); *Sturgis v. State of Washington*, 368 F. Supp. 38 (W.D. Wash.), *aff'd mem.* 414 U.S. 1057, 94 S. Ct. 563, 38 L. Ed. 2d 464 (1973); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971).

II. Are the Defendants "Persons" within 42 U.S.C. § 1983?

[3] Defendants argue that this suit cannot be maintained against either the University of Maryland or Dr. Elkins, its President, since neither are "persons" within the meaning of 42 U.S.C. § 1983.

In *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the Supreme Court held that municipalities were not "persons" within the meaning of 42 U.S.C. § 1983, at least in damage suits. *Kenosha v. Bruno*, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973), makes clear that that ruling also applies where the only relief sought is injunctive or declaratory. *Moor v. County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973), established that counties were not § 1983 persons. In *Huntley v. North Carolina State Board of Education*, 493 F.2d 1016, 1017 n.2 (4th Cir. 1974), the Fourth Circuit decided that municipal agencies are not "persons" for § 1983 purposes. A state is also not a proper defendant in a § 1983 action. *Meyer v. State of New Jersey*, 460 F.2d 1252 (3rd Cir. 1972; *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Hinish v. State of*

Maryland, 393 F. Supp 53 (D. Md. 1975). This doctrine applies equally to state agencies. *Bennett v. People of State of California*, 406 F.2d 36 (9th Cir.), *cert. den.*, 394 U.S. 966, 89 S. Ct. 1320, 22 L. Ed. 2d 568; *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir.), *cert. den.*, 419 U.S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 107 (1974); *Edwards v. Philadephia Electric Co.*, 371 F. Supp. 1313 (D.C. Pa. 1974), *aff'd* 510 F.2d 969 (3rd Cir. 1975).

If the University of Maryland is a state agency, it is not a "person" within § 1983 and no cause of action can be brought against it under that section. Courts considering whether a particular college or university is or is not a state agency have considered the laws of the state as they define the relationship between the state and the school; whether the school is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of the school's autonomy over its operations; the ownership of the school's property; whether its property is immune from state taxation; whether the sovereign has immunized itself from responsibility for the school's operations; whether a judgment for damages against the school would be payable out of the state treasury; and the source of the school's financing. It has also been stated that generally the same inquiry is made and criteria considered in determining whether a state university is a § 1983 "person" as is made in deciding whether a damage suit against the state university would be barred by the Eleventh Amendment. *See Gordenstein v. University of Delaware*, 381 F. Supp. 718 (D. Del. 1974); *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974), *app. dismissed* 506 F.2d 355 (3d Cir. 1974); *Langsner v. Morgan State College*, Civil No. HM-74-1359 (D. Md. Jan. 9, 1976).

In *Langsner* Judge Herbert F. Murray held that Morgan State University was a state agency and not a "person" within the meaning of § 1983. In the present case an uncontradicted affidavit[6] of Dr. Wilson H.

[6] Under Rule 56, F.R.Civ.P., the uncontradicted facts in this affidavit may be taken as true.

Elkins, President of the University of Maryland, has been filed which establishes that virtually all of the factors considered determinative in *Langsner* apply also to the University of Maryland. These factors set forth in the margin[7] fall within the scope of the factors discussed in *Gordenstein, supra,* and *Samuel, supra,* as well. We are persuaded that the University of Mary-

[7] Dr. Wilson's affidavit states:

"(a) All real property of the University belongs to the State of Maryland, and substantially all such property is titled in the name of the State of Maryland to the Use and Benefit of the University of Maryland or to the Use and Benefit of the Board of Regents of the University of Maryland;

"(b) The sale and/or lease of real property of the University is reviewed by the Department of General Services, State of Maryland, and approved by the Board of Public Works (including the Governor of the State of Maryland), State of Maryland. The acquisition and/or lease of real property by the University of Maryland is similarly reviewed and approved;

"(c) All, or substantially all, of the contracts and leases to which the University of Maryland is a party are first reviewed by the Office of the Attorney General, State of Maryland;

"(d) Payroll checks of employees of the University are drawn on the treasury of the State of Maryland and bear the facsimile signatures of the Treasurer and Comptroller of the State of Maryland;

"(e) The annual Budget of the University is presented to and must be approved by the General Assembly of the State of Maryland, and is subject to review and amendment by the State Department of Budget and Fiscal Planning;

"(f) All University funds are funds of the State of Maryland. All funds available to the University are obtained substantially through appropriations of the Maryland General Assembly, including student fees, and government and private grants, which are specifically appropriated by the General Assembly for use by the University. All, or substantially all, bills paid by the University are paid through checks drawn on the Treasury of the State of Maryland;

"(g) The purchase of goods and equipment by the University is exempt from Maryland Sales Tax. The

land, like Morgan State College, is not a § 1983 "person" and cannot be sued under that section.

With respect to the other defendant, Dr. Elkins, however, it is equally clear that when he is sued in his official capacity under 42 U.S.C. § 1983 in a suit seeking injunctive and declaratory relief only, he is a "person"

University is entitled to avail itself of the purchasing facilities of the Maryland Department of Budget and Procurement;

"(h) The University's financial records are audited by the Maryland General Assembly, Division of Legislative Auditors. The University must also provide to the Board of Public Works or any member of the General Assembly any requested information about any phase of its operation, and must make an annual report thereon to the latter;

"(i) Decisions by the University with respect to employment grievances, including terminations, of classified employees, are appealable for determination by the Secretary of Personnel, State of Maryland;

"(j) Such comprehensive liability insurance as the University is permitted to carry is authorized and limited under Article 77A, § 15A of the Annotated Code of Maryland. Insurance to University property is provided through participation in State of Maryland Insurance Plans;

"(k) The Board of Regents of the University consists of fifteen members. The Governor of the State of Maryland appoints fourteen with the advice and consent of the State Senate. The remaining members are the Maryland Secretary of Agriculture;

"(l) The Governor, the State Treasurer, and the State Comptroller are notified of all meetings of the Board of Regents of the University and have the authority to sit with the Board. The State budget director, and the chairmen of the State Senate Finance committee and the State House Ways and Means committee are invited to sit with the Board when requests for appropriations are prepared.

"(m) The University obtains its legal representation from the Attorney General of the State of Maryland"

In addition to the above, as noted by Judge Murray in *Langsner*, Art. 78A § 16C of the *Annotated Code of Maryland* would appear to indicate that any money judgment, against the University of Maryland "will be paid, if at all, by the State of Maryland." *Langsner*, p. 9.

for purposes of that section and amenable to suit thereunder. *Burt v. Board of Trustees of Edgefield Co. School Dist.*, 521 F.2d 1201 (4th Cir. 1975); *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Gay Students Organization of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Rochester v. White*, 503 F.2d 263 (3d Cir. 1974); *Langsner v. Morgan State College, supra.*

III. Case or Controversy

[4] Defendants argue that this court lacks jurisdiction because no Art. III § 2[8] case or controversy exists between the plaintiffs and the defendants because the plaintiffs, dependent as they are on their parents, presumably do not pay their own tuition and thus stand to lose or gain nothing by the outcome of this lawsuit. Aside from the lack of evidence in the record to support the underlying assumption on the part of the defendants it is clear that the plaintiffs in this case are presenting a constitutional question "in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110, 89 S. Ct. 956, 960, 22 L. Ed. 2d 113 (1969). It is the plaintiffs themselves who attend the University of Maryland and who are allegedly being unconstitutionally overcharged by that institution.

The plaintiffs in this case have a personal stake in the outcome and have an interest adverse to the defendants since the tuition rates charged them as nonresidents must be paid in order for them to attend the University of Maryland. Plaintiffs' complaint alleges that they themselves are being subjected to higher tuition and other costs. Moreover, under Maryland law, *Annotated Code of Maryland*, Art. 1 § 24, plaintiffs who are all over 18, are adults. The law places no responsibility on their parents to pay their tuition. If these rates cannot be paid, either by the plaintiffs themselves, by their parents, or by both parents and students, the

[8] Art. III § 2 of the Constitution of the United States limits the judicial power of federal courts to "Cases" or "Controversies."

resulting loss of educational opportunity falls squarely on the plaintiffs. They have a sufficient interest to make the lawsuit an Article III case or controversy under the tests laid down by the Supreme Court. *O'Shea v. Littleton,* 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974); *Goosby v. Osser,* 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973); *see also Warth v. Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974).

IV. Standing

[5] Defendants also allege that plaintiffs lack standing to sue because they are financially dependent on their parents who, therefore, presumably pay all of plaintiffs' tuition costs. While the Supreme Court has noted that the concept of justiciability, which expresses the "case or controversy" requirement of Article III, is not synonymous with that of standing, *Schlesinger v. Reservists, etc., To Stop The War,* 418 U.S. 208, 215, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), they do overlap. *See Warth v. Seldin, supra,* 422 U.S. at 498-499, 95 S. Ct. at 2204, where it is stated:

> "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr,* 369 U.S. 186, 204 [82 S. Ct. 691, 7 L. Ed. 2d 663] (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or

actual injury resulting from the putatively illegal action. . . .' *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 [93 S. Ct. 1146, 35 L. Ed. 2d 536] (1973). *See Association of Data Processing Service, Inc. v. Camp*, 397 U.S. 150, 151-154 [90 S. Ct. 827, 25 L. Ed. 2d 184] (1970)." (Footnotes omitted).

The plaintiffs in this case, as discussed above, are asserting their own legal rights and interests and have a sufficient stake in the outcome of this lawsuit to establish standing to bring it. *United States v. SCRAP*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973); *Association of Data Processing Organizations Inc. v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

V. The Eleventh Amendment

Defendants argue that the Eleventh Amendment to the Constitution bars this suit.[9]

[6, 7] Since the defendant University of Maryland cannot be sued under 42 U.S.C. § 1983, the Eleventh Amendment defense need be considered only with respect to Dr. Elkins. The short answer to this contention is that the Eleventh Amendment does not bar suits seeking only prospective injunctive relief against state officials who, acting in their official capacity under color of state law or regulation, deprive plaintiffs of constitutional rights. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Any ancillary effect which a prospective injunction against Dr. Elkins, if issued in this case, would have on the treasury of the State of Maryland is a "permissible and often an inevitable consequence of the principle announced in *Ex Parte Young, supra*." *Edelman v. Jordan, supra*, 415 U.S. at 668, 94 S. Ct. at 1358.

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[9] The Eleventh Amendment provides:

"The Judicial power of the United States shall be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

VI. Absention

[8] Defendants urge the court to abstain from deciding this case in order that the Maryland courts can decide if a G-4 alien can be domiciled in Maryland.

Abstention is a judicially created doctrine. It has several branches to its family tree. Two of these branches are urged as applicable here to warrant this federal court to stay its hand.

The first is the abstention rationale enunciated in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), holding that a federal court should abstain in order to avoid unnecessary conflict with the regulation by a state of a complicated area of local interest.

The *Burford* case arose out of disputes concerning the application of a regulation of the Texas Railroad Commission establishing minimum spacing between oil wells. In *Burford* the Court stressed that abstention was appropriate because the Texas scheme of regulating oil and gas drilling was an extremely thorny problem involving certain "non-legal complexities." (*Id.* at 323, 63 S. Ct. 1098). The Texas legislature had established a Commission to resolve these technically complicated geologic factual disputes, "as a part of the entire conservation program with implications to the whole economy of the state." (*Id.* at 325, 63 S. Ct. at 1103). Moreover the Texas legislature had also established a system of thorough judicial review by its own state courts which could provide as full relief as could the federal courts. By concentrating all direct review of the Commission's orders in the state district court of one county, the Texas legislature also sought to avoid the confusion of multiple review of the same general issues. Prior interference by federal courts in this regulatory scheme, the *Burford* Court noted, had previously caused such confusion and had created numerous problems for the Texas Governor, the Texas legislature and the Railroad Commission.

The considerations which persuaded the *Burford* Court to order federal abstention are absent from this case. The process by which the University of Maryland determines a student's domicile does not involve a complicated area which the Maryland legislature has singled out for special treatment. The legislature has not seen the need to create a state agency staffed with experts in order to effect a consistent and harmonizing treatment of a particularly thorny matter of local interest. There is no special system of judicial review. There is no history of prior interference by the federal courts in the University of Maryland's procedures, causing confusion and inconsistency. It is not predictable that the normal functioning of the system by which the state determines a student's domicile would give rise to a surfeit of lawsuits seeking to interpose federal courts in matters of purely state interest. Even this suit, although the named plaintiffs do seek this court to declare them Maryland domiciliaries, has as its primary thrust to force the classification process to operate meaningfully with respect to G-4 alien students. The plaintiffs here are not seeking to "short circuit" the University of Maryland's classification scheme, but rather have submitted themselves to it. A decision by this court on the merits of plaintiff's complaints will not conflict with a state regulatory scheme in the manner feared by the Court in *Burford*. Since none of the factors determinative in *Burford* exists here, abstention on the rationale of that case is not warranted.

The second branch of the abstention family tree invoked by the defendants is the so-called *Pullman* doctrine. The decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), and its progeny have established that abstention is proper where an interpretation or construction of an unclear state statutory or constitutional provision might end the litigation, thereby eliminating the need for a federal court to resolve federal constitutional issues. *Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973); *Lake Carriers' Association v.*

MacMullan, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1974). The primary reasons for invoking abstention in the *Pullman* context are to avoid unnecessary friction in federal-state relations and to avoid premature federal constitutional adjudication. *Harman v. Forssenius*, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965).

The language of the "In-State Policy" of the University of Maryland which is under attack here is not subject to an interpretation in a Maryland court which would avoid plaintiffs' federal constitutional challenge. That regulation on its face establishes that only "U.S. citizens" and "immigrant aliens" can establish in-state status, and then only under certain conditions which are discussed *infra*. By virtue of the words of the "In-State Policy," the University of Maryland, as a result of the fact that the plaintiffs' fathers, whose domiciles are determinative of their respective dependent's residency status, are all non-immigrant G-4 aliens, will automatically attribute to them out-of-state status for admission, tuition and charge differential purposes. No interpretation of the wording of the "In-State Policy" has been offered which changes that stated result. Since the regulation is clear and is not subject to any interpretation which could avoid a federal constitutional issue, the reasons for invoking the *Pullman* abstention doctrine are absent. *Wisconsin v. Constantineau*, 400 U.S. 433, 437-439, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971); *Zwickler v. Koota*, 389 U.S. 241, 250, 251, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967).

Nevertheless, defendants argue that abstention is appropriate because the Maryland courts have never decided whether or not a G-4 alien could establish a Maryland domicile. This novel abstention argument would require federal courts to abstain whenever an unresolved question of state common law is involved in federal constitutional litigation. Defendants have presented no authority, and the court has found none, which supports the application of the abstention

doctrine in these circumstances. The Maryland common law of domicile is clear and provides sufficient background to resolve the domicile question raised by the plaintiffs in the context of their federal constitutional challenge to the University of Maryland's policies. *See Mariniello v. Shell Oil Company,* 511 F.2d 853, 860-861 (3rd Cir. 1973).

Federal district courts are presumed to be knowledgeable in the law of the states in which they sit, *see Runyon v. McCray,* ___ U.S. ___, ___, ___, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), and are often called upon to resolve state law domicile questions in diversity of citizenship cases.[10] While this is not a diversity case and there is a constitutional question to be resolved, on balance, it would be unwise to extend the abstention doctrine to a case such as this. No principles of federalism would be advanced since no unclear state statute or constitutional provision subject to state court construction or interpretation is involved. The delay and expense attendant if the court abstained would be great. Abstention has been confined to certain narrowly limited special circumstances, *Kusper v. Pontikes, supra; Lake Carrier's Association v. MacMullan, supra; Lindsey v. Normet,* 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), which do not exist here. Therefore, the court declines to abstain in this case. *See also Examining Board of Engineers, Architects and Surveyors v. DeOtero,* 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976).

VII. The Merits

A. Due Process

Plaintiffs raise a due process claim, relying principally on *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230,

[10] Abstention has never been deemed appropriate in diversity cases merely where there are unsettled questions of state law involved. *McNeese v. Board of Education,* 373 U.S. 668, 673, n. 5, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); *Meredith v. Winter Haven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943); *Martin v. State Farm Insurance Co.,* 375 F.2d 720, 722 (4th Cir. 1967).

37 L. Ed. 2d 63 (1973); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), *and Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974). While plaintiffs do not challenge the University of Maryland's policy of charging non-domiciliaries higher tuition rates, they do allege that the University of Maryland's "In-State Policy" creates an irrebuttable presumtpion, that non-immigrant aliens holding G-4 visas cannot establish a Maryland domicile, a fact that is not, they argue, universally true.

In *Vlandis*, the Supreme Court declared unconstitutional a Connecticut statute which classified certain married and unmarried students accepted for admission to the University of Connecticut as out-of-state students for tuition purposes based on the applicant's legal address prior to or at the time of his application. Under the statute, if a student were classified "out-of-state" under this system at the time of application for admission, the student could not change his status no matter what the student's actual domiciliary intent was at a later date. The student's status established at the time of his application for admission was deemed to continue during his period of attendance at the university.

In reaching its decision the Court noted:

> "It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category." (412 U.S. at 448, 93 S. Ct. at 2234).

Under these circumstances, the Court rejected the state's attempts at justification and held that:

> ". . . since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the

> resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona-fide resident entitled to in-state rates." (412 U.S. at 452, 93 S. Ct. at 2236).

In *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the Court held unconstitutional on due process grounds Illinois' statutory irrebuttable presumption that all unmarried fathers are unqualified to raise their children. The Court said that a state could not conclusively presume that every unmarried father was unfit to raise his children, but must under the due process clause provide an opportunity for a hearing on the issue of a particular unmarried father's fitness where his fitness was challenged.

Similarly, in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), the Court invalidated mandatory leave and return rules for pregnant teachers in Ohio and Virginia on due process grounds, because the rules established conclusive presumptions of facts which were not universally true, namely that all women, who were 4 or 5 months pregnant or who gave birth 3 months or less before they sought to return to work, were physically incapable of performing their duties. The Court held that such determinations had to be made on an individual basis. The maternity leave rules were found to have no rational relationship to the interests of those states in preserving continuity of instruction and in protecting the health of the mother or expectant mother.

In this case, then, several questions relative to plaintiffs' due process claim must be resolved: (1) does the University of Maryland's "In-State Policy" create an irrebuttable presumption concerning the domicile of

G-4 alien? (2) if so, is that presumption appropriate because universally true? (3) if not, can the defendants so justify that presumption as to save it from unconstitutionality?

The defendants argue that the "In-State Policy" does not rest upon or create an irrebuttable presumption as to the domicile of a G-4 alien, but merely establishes the status of an individual as a G-4 alien as one of the factors to be considered in determining domicile for tuition purposes, albeit the "paramount" factor. Defendants also argue that there is no irrebuttable presumption, because plaintiffs may, as may any other student, obtain review of their domiciliary classification at any time. However, these arguments fall short of the mark. As admitted at oral argument, and as evidenced by the express language of the "In-State Policy," the University of Maryland determines on a case-by-case basis for tuition and fees purposes the domicile of only *"United States citizens* and . . . *immigrant aliens lawfully admitted for permanent residence* in accordance with the laws of the United States." Under the University's policies, a financially independent student in the United States on the basis of a G-4 visa, or a student who is financially dependent on a parent who holds a G-4 visa, as are the named plaintiffs in this case, is automatically "attributed out-of-state status for admission, tuition, and charge differential purposes. . . ."[11] So long as the G-4 visa status of the student or his parent continues, any other evidence of domicile brought before the University could not possibly produce a reclassification of the student in question. The single controlling factor in the case of a G-4 alien is that visa classification. All other facts relating to domicile are irrelevant. The fact that the State will listen to evidence totally immaterial to its predetermined conclusion concerning the domicile of a G-4 alien

[11] The University bases the tuition rates of a financially dependent student on the domicile of his parents. A parent with a G-4 visa could not, under the In-State Policy, establish a Maryland domicile.

does not make that conclusion any less irrebuttable. *See United States Department of Agriculture v. Murry*, 413 U.S. 508, 512, 93 S. Ct. 2382, 37 L. Ed. 2d 767 (1973); *Stanley v. Illinois, supra.*

However, even if a certain presumption of fact is irrebuttable, the resulting classification system is not *a fortiori* unconstitutional. If the presumed fact is necessarily true, it would be different from the presumptions about students in *Vlandis*, mothers in *LaFleur*, fathers in *Stanley*, household members in *Murry*, and drivers in *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), among others, which the Court has previously invalidated.

The defendants have argued that domicile is the basis on which tuition rates are determined and that all nonresident aliens, including those in the United States on G-4 visas, are precluded by the terms and conditions of their visas from being domiciled in Maryland. If, as the defendants argue, under the law of domicile of Maryland, a G-4 alien cannot establish domicile, then a classification based on domicile which presumes nondomicile for such aliens is not contrary to fact and is universally true. Inquiry therefore must be made into the common law of Maryland relating to domicile and into federal law defining the nature of a G-4 alien's stay in the United States.

B. Maryland Law of Domicile

In *Shenton v. Abbott*, 178 Md. 526, 15 A.2d 906 (1940), the Court of Appeals of Maryland held that:

> "A person's domicile is the place with which he has a settled connection for legal purposes, either because his home is there or because that place is assigned to him by the law. It is well defined as that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning." (*Id.*, at 530, 15 A.2d at 908).

Shenton v. Abbott also establishes that a person retains his original domicile if he does not acquire a new one. Two elements must be shown to prove a change of domicile: (1) actual removal to or physical presence in another habitation and (2) an intent to remain there permanently or at least for an unlimited time. *Id.* at 530, 15 A.2d 906. If a person has established a new domicile, a "floating intent to return to his former domicile at some future time" does not negative the intent to establish the new domicile. *Id.* at 533, 15 A.2d at 909.

It is indisputable in this case that plaintiffs' fathers, because they are G-4 aliens, did not have Maryland as their respective original domiciles but each could only have acquired a Maryland domicile if he had changed his original domicile. The court in *Shenton* also stated:

> "No temporary residence, whether for the purposes of business, health, or pleasure, occasions a change of domicil. Even though a person may be absent from his domicil for many years, and may return only at long intervals, nevertheless he retains his domicil if he does not acquire a domicil elsewhere." (*Id.*, at 530, 15 A.2d at 908).

As a general proposition of law, *Shenton* noted that "[T]he determination of the place of domicil depends upon the circumstances of each case." (*Id.*, at 533, 15 A.2d at 909). All of these principles are still controlling Maryland law. *Bainum v. Kalen,* 272 Md. 490, 325 A.2d 392 (1974); *Knapp v. Comptroller,* 269 Md. 697, 309 A.2d 635 (1973); *Liberty Mutual Insurance Co. v. Craddock,* 26 Md. App. 296, 338 A.2d 363 (1975).

In addition to physical presence and intent to remain permanently or indefinitely, the Maryland courts implicitly recognize, as another factor necessary to the establishment of a new domicile, that the person seeking to change his domicile must have the legal capacity to do so. *Liberty Mutual Insurance Co. v. Craddock, supra,* at 303, 338 A.2d 363. *See Restatement (Second) of Conflicts,* § 15 (1971). Thus, in the case of a

minor child, ordinarily legally incapable of a domicile separate from that of its parent, the domicile of a minor child in Maryland is with its parents. If the child's parents are divorced, the child's domicile is that of the parent to whom legal custody has been awarded. *Taylor v. Taylor,* 246 Md. 616, 619, 229 A.2d 131 (1966); *Berlin v. Berlin,* 239 Md. 52, 55, 210 A.2d 380 (1964); *Rethorst v. Rethorst,* 214 Md. 1, 133 A.2d 101 (1957). However, a minor child retains the domicile of its father if the child lives with neither parent. *Rethorst v. Rethorst, supra,* at 12, 133 A.2d 101. If there has been no legal fixing of custody, then the minor child's domicile is that of the parent with whom it lives. *Id.*; *Ross v. Pick,* 199 Md. 341, 349, 86 A.2d 463 (1952). A minor child who falls within these common law principles can never establish an independent domicile, whatever may be that child's intent to do so. Because a minor child is not *sui juris* and can therefore not have legal effect given to its actual intent, physical presence in a certain state, and an intent to remain there indefinitely, do not fix or change the domicile of a minor. During minority, the common law fixes the child's domicile. *Sudler v. Sudler,* 121 Md. 46, 88 A. 26 (1913).

There is nothing in Maryland law, possibly aside from the principle that a person intending a change in domicile must be legally capable of doing so, to prevent a G-4 visa holder from obtaining a Maryland domicile. Therefore, federal law must be examined to determine whether such law relating to G-4 aliens in any respect renders such aliens legally incapable of changing the domicil.

C. Federal Law

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.,* defines 12 classes of nonimmigrant aliens which, including subclasses, describe 17 types of nonimmigrants. Class G aliens are aliens who are in the United States as resident representatives of foreign governments and members of their immediate families and staffs, as well as aliens who are foreign

representatives to or employees of international organizations covered by the International Organizations Immunities Act, 22 U.S.C. § 288, and members of their immediate families and personal staffs. Specifically, G-4 aliens are:

> "(iv) officers, or employees of such international organizations and the members of their immediate families."

In contrast to those classes of aliens who are defined as aliens "having a residence in a foreign country which [they have] no intention of abandoning," 8 U.S.C. § 1101(a)(15)(B), (F), (H), (J), or as aliens who intend to enter the United States "temporarily" or who are "in transit" § 1101(a)(15)(C), (D), (L), a G-4 alien is simply defined as an employee of an international organization. The statute, therefore, does not define a G-4 alien in terms of an express intent on the part of such alien relative to his domicile.

The visa itself held by a G-4 alien is not determinative of the domicile issue. A visa is essentially a document of entry. *Alves v. Alves*, 262 A.2d 111, 115 (D.C. App. 1970); see 22 C.F.R. § 41.120. Its period of validity has no relation to the period of time an alien may be authorized by the immigration authorities to stay in the United States, 22 C.F.R. §41.122(a). The stay of a G-4 alien is governed by regulations of the Immigration and Naturalization Service. 8 U.S.C. § 1184(a). As provided in 8 C.F.R. § 214.1(a):

> "(a) *General.* Every nonimmigrant alien applicant for admission or extension of stay in the United States shall . . . agree that he will abide by all terms and conditions of his admission or extension, and that he will depart at the expiration of the period of his admission or extension or an abandonment of his authorized nonimmigrant status."

The period of admission of a G-4 alien is for so long as the alien continues to be recognized by the Secretary of State as a member of that class of aliens. In terms of the present case, the period of admission of the

plaintiffs' fathers is for so long as they are respectively employed by international organizations governed by the International Organizations Immunities Act, cited *supra*. 8 C.F.R. §§ 214.1(a), 214.2(g).[12]

[9] The mere fact that a G-4 alien is subject to being deported if he changes his employment does not make him legally incapable of establishing a Maryland domicile or of intending to remain or remaining here indefinitely. In *Alves v. Alves, supra,* the District of Columbia Court of Appeals held specifically that a G-4 alien was domiciled in the District of Columbia. In that divorce case the appellant wife challenged the finding of the lower court that her husband was a D.C. domiciliary on the ground here argued that "the appellee did not have the legal capacity to form an intention to become a domiciliary of the District of Columbia since he was living here at the grace of Great Britain and United States." (*Id.*, at 114). The wife also argued that the husband had to adjust his status to permanent resident before he could become domiciled in the District of Columbia.[13] The *Alves* court rejected the last contention holding that under the immigration laws it is legally possible "for an alien to remain in the United States for many years . . . without applying for permanent residence" and that such a contention wrongfully ignores, "the period of time [the alien had] resided in the District of Columbia, his intention in moving into the District of Columbia and other relevant

[12] Under 8 U.S.C. § 1251(a)(9) an alien is subject to deportation who— "(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed . . ., or to comply with the conditions of any such status."

[13] The domicile rule in the District of Columbia as quoted by the court in *Alves* is substantially similar to the Maryland rule:

> ". . . physical presence with an intent to abandon the former domicile and to remain in the District of Columbia for an indefinite period of time." (*Alves, supra,* at 114).

factors." ((Id., at 115). As to the first contention the court held:

> "The fact that appellee entered the United States on a nonimmigrant visa . . . does not preclude a finding that appellee could become domiciled in the District of Columbia.
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> * * * * * *
>
> . . . At best it might be argued appellee had a floating intent to return to Great Britain conditioned upon an uncertain event — his dismissal from the I.M.F. — which event may never occur. But such a floating intention to return to Great Britain is not sufficient to require a holding that appellee was still domiciled in Great Britain." (footnotes omitted). (*Id.*, at 115-116).

Accord, Rzeszotarski v. Rzeszotarski, 296 A.2d 431 (D.C. App. 1972); *Gosschalk v. Gosschalk*, 48 N.J. Super. 566, 138 A.2d774, *aff'd*, 28 N.J. 73, 145 A.2d 327 (1958). The Court of Appeals of Maryland, as mentioned above, has also held that a floating intent to return to a former domicile at some future date does not negative the intent to establish a new domicile. *Shenton v. Abbott, supra*, at 533, 15 A.2d 906.

The *Restatement (Second) of Conflicts* recognizes in §17, Comment g, that a refugee may acquire a domicile of choice even if he is present in this country on a temporary visa:

> "Even in the latter situation, [refugee present on a temporary visa] it is possible for a refugee to acquire a domicile of choice in his asylum, although the presumably temporary nature of his stay may cast some doubt upon whether he has formed the requisite attitude of mind toward it . . ." (Citations omitted). (*Id.*, at 69).

The *Restatement* also states with respect to domiciliary intent that:

> "[I]f [one] does not intend to move at a definite time, it is easier to find that he has this attitude of mind than if he intends to move at a definite time.

> It is possible, however, for a person to have the proper attitude of mind even though he does intend to move at a definite time; although the more distant that time is, the easier it is to find the requirement satisfied." (*Id.*, at 71).

The rule expressed in *Alves* and in the *Restatement*, as applied to a G-4 alien, who presently intends to remain in Maryland indefinitely but who may have to return to his native country at the conclusion of his employment, makes it clear that such a G-4 alien is not legally incapable of establishing a Maryland domicile. Furthermore, as noted *supra*, there is nothing in the statutory definition in 8 U.S.C. § 1101 of a G-4 alien, as opposed to certain other types of nonimmigrant aliens, which indicates that Congress sought to negate a domiciliary intent on the part of a G-4 alien.

In summary, under Maryland law the plaintiffs' fathers must be able to demonstrate physical presence in Maryland, an intent to remain here indefinitely and the legal capability to do so. The federal immigration laws do not render the plaintiffs' fathers legally incapable of demonstrating and being able to carry out a present intention to remain in Maryland indefinitely. Plaintiffs' fathers' G-4 status, in fact, gives them that precise status, residents of Maryland for an indefinite period of time. This legal capacity coupled with physical presence and sufficient evidence of the requisite intent is all that the law of Maryland requires to establish domicile.

Defendants place principal reliance on Revenue Ruling 74-364 and *Seren v. Douglas*, 30 Colo. App. 110, 489 P.2d 601 (1971).

The Revenue Ruling squarely holds that a G-4 alien is under a legal disability which renders him incapable of forming the intention necessary to establish a domicile in the United States. That holding is based on the fact that a G-4 alien is required to depart at the expiration of the period of his admission. However, as demonstrated above, under federal law a G-4 alien is capable of

remaining in Maryland indefinitely and, therefore, has the legal capacity to have the necessary intent to establish a Maryland domicile while physically present in Maryland. As an explication of the *law of domicile,* this court believes the Revenue Ruling is in error.

Revenue Ruling 74-364 relies as do the defendants, on *Seren v. Douglas, supra.* In that case, Seren, a student, entered the United States in 1967 on a student visa which expired in April, 1968. In July of 1968, after Seren had married a University of Colorado coed, a petition for an immigrant visa was granted which entitled him to apply for status as a permanent resident alien. On January 20, 1970, the United States Immigration and Naturalization Service granted Seren the status of "lawful permanent resident." The University of Colorado contended that Seren, who had been a non-student resident of Colorado between April, 1968, and January, 1970, was under a legal disability prior to January 20, 1970, to formulate the requisite intent to become domiciled in Colorado. The University based its contention on the fact that Seren had entered the United States on a student visa and was a nonimmigrant alien classified under 8 U.S.C. § 1101(a)(15)(F)(i) as an alien with "a residence in a foreign country which he has no intention of abandoning . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . .." With respect to this argument, the court held:

> "We agree that the federal statutes in question did create a legal disability which would render Seren incapable of forming the intent required by state statute *so long as he, in compliance with federal law, was here on a legal basis which bound him to not abandon his homeland.* However, that disability could, as a matter of fact and law, have dissolved upon the expiration of his student visa. At such time he could abandon his legal intent to return to his homeland and seek status as a permanent resident of the United States." (Emphasis added).

A G-4 alien is not bound by federal law "to not abandon his homeland" and could at any time "abandon his legal intent to return to his homeland and seek status as a permanent resident of the United States." Therefore, the very language of the *Seren* court warrants a holding that a G-4 alien is not under a legal disability to establish a Maryland domicile. The *Seren* court also held that the dissolution of Seren's legal disability was not contingent on his being granted lawful permanent resident status on January 20, 1970, but that the disability dissolved prior to that date.

In Re Gaffney's Estate, 141 Misc. 453, 252 N.Y.S. 649 (1931), also relied on by the defendants, is distinguishable on at least two grounds. That case dealt with whether Patrick Cassidy, who had "arrived in this country only recently" (*id.,* at 652) as a temporary visitor for 3 months only, could qualify under New York law to be appointed as administrator of his brother's estate. New York law rendered incompetent one who was an "alien not an inhabitant of this state." In finding that Cassidy was not competent, the court relied on the fact that Cassidy was present only for 3 months on a visitor's visa and would have to leave the country at the end of that time. As distinguished from Cassidy's situation, the holder of a G-4 visa is not under similar constraints. In noting that, "[A]lienage alone does not disqualify an administrator, but there must be adequate proof of his being an inhabitant" (citation omitted) (*id.,* at 653), the *Gaffney's Estate* court highlighted the second ground upon which that case is distinguishable from this one. Far from deciding that a nonimmigrant alien could never establish a domicile in the United States, the court there decided only that Mr. Cassidy did not establish by competent evidence that he was an "inhabitant" of New York.

[10, 11] The presumption utilized by the University of Maryland in enforcing its "In-State Policy" is that no class of nonimmigrant aliens can establish a Maryland domicile. As such, it is an irrebuttable presumption

which is not universally true since G-4 aliens are not legally incapable of establishing Maryland domicile. That the University has "reasonable alternative means of making the crucial determination" of a nonimmigrant alien's domicile, *Vlandis v. Kline, supra* 412 U.S. at 452, 93 S. Ct. at 2236, is demonstrated by the fact that it makes just such a determination on a case-by-case basis with regard to other students seeking to pay domiciliary tuition rates under its "In-State Policy." The irrebuttable presumption relating to nonimmigrant aliens encompassed by the University's "In-State Policy" therefore is an invalid measure of domicile.[14]

If the University were to seek to justify its treatment of nonimmigrant aliens on the theory of cost equalization, this argument must fail because basing a conclusive presumption of non-domicile on nonimmigrant status would be as stated in *Vlandis* "wholly unrelated to that objective." (*Id.*, at 441, 93 S. Ct. 2230). Nonimmigrant aliens, even those such as plaintiffs' fathers whose salaries are exempt from state income tax, who have resided in Maryland for 10 or 15 years, as have plaintiffs' fathers, might well have contributed far more financial support to the University of Maryland through payment of real property, sales and other taxes than would have a student, financially independent for at least 12 months, who maintained a domicile in Maryland for 6 months prior to his class registration. Yet such a student, who conceivably could have contributed almost nothing to the Maryland tax base, is allowed to prove Maryland domicile under the "In-State Policy." Nor can the University's policy be justified on the ground of administrative certainty or administrative convenience. *Vlandis v. Kline, supra,* at 441, 93 S.

[14] The fact that Congress, empowered by the Constitution and statute to distinguish between citizens and aliens, may legitimately draw lines to establish qualification requirements, under which certain aliens will be eligible for federally funded programs and others will not, does not necessarily raise parallel powers in the States. *See Mathews v. Diaz,* 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).

Ct. 2230; *Stanley v. Illinois, supra,* 405 U.S. 656, 92 S. Ct. 1208. *Cf. City of Charlotte v. Local 660, etc.,* 426 U.S. 283, 96 S. Ct. 2036, 48 L. Ed. 2d 636 (1976).

Since the "In-State Policy" of the University of Maryland, as applied to G-4 aliens, creates a constitutionally impermissible irrebuttable presumption, it is not necessary to reach the issues raised by plaintiffs' equal protection and supremacy clause claims.

D. Relief

Declaratory relief and an injunction prohibiting the University of Maryland from denying to the plaintiffs in-state status solely because they or their parents are holders of a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) must be granted in this motion for summary judgment.[15] However, in addition plaintiffs also request this court (1) to enjoin the defendants from failing to

[15] Neither declaratory nor injunctive relief with respect to plaintiffs' fathers' tax-exempt status is warranted. Because the University of Maryland automatically determined that the plaintiffs' fathers', as G-4 aliens, were not Maryland domiciliaries, the University never meaningfully applied domiciliary criteria, see *supra,* to the plaintiffs. One of these criteria is whether or not the person whose domicile is being determined pays Maryland income tax on all earned income. The record does not establish that the University would universally deny "in-state" status to students solely on this ground. In fact, the defendants have admitted that a parent holding an immigrant visa could establish Maryland domicile regardless of a Maryland income tax exemption, if that parent could demonstrate the other relevant domiciliary criteria. (Defendants' answers to plaintiffs' requests for admissions, Paper No. 7, ¶ 10). This issue is not ripe for resolution in this case. Since the University of Maryland will be required, henceforth, to review G-4 aliens in the same manner as citizens and immigrant aliens, the court will presume that all of these individuals will be given the same kind of review. The court will also presume that, consistent with the University's admission, it will not preclude any student from establishing that he or she is a domiciliary of Maryland solely because of that student's parent's Maryland tax-exempt status under an international agreement. If the University were to act contrarily, serious constitutional questions would arise.

classify them as in-state students, (2) to certify this suit as a class action, (3) to frame appropriate relief for the class so certified, and (4) to award plaintiffs costs and attorneys' fees.

In order for plaintiffs to prevail on this motion for summary judgment in their request that they be classified as in-state students, the court must find that there is no dispute concerning the facts material to a determination that each of the fathers of the plaintiffs, on whom each plaintiff is dependent, is domiciled in Maryland.

[12] The law in this Circuit governing summary judgment is very strict. In order for summary judgment to be granted there can be no dispute as to any material fact or as to any controlling inference to be drawn from material facts. *American Fidelity and Casualty Co. v. London and Edinburgh Insurance Co.*, 354 F.2d 214, 216 (4th Cir. 1965). The burden is on the plaintiffs to establish that there are no such disputes, and any doubt as to the existence of a disputed material fact or inference drawn therefrom must be resolved against the plaintiffs. *Phoenix Savings and Loan, Inc. v. Aetna Casualty & Surety Co.*, 381 F.2d 245, 249 (4th Cir. 1967).

Plaintiffs, in attempting to establish that the undisputed facts warrant a holding that their fathers are domiciled in Maryland, rely on their Verified Complaint and the exhibits attached thereto and on the affidavits filed as part of their motion for summary judgment.

[13, 14] Plaintiffs' reliance on the Verified Complaint filed in this case is misplaced. Since the relevant domicile for tuition purposes under the valid portion of the University's "In-State Policy" is the domicile of plaintiffs' fathers, any verification of facts alleged in the complaint by the plaintiffs themselves is of little evidentiary value on the crucial question of the present intent of each father to remain permanently or indefinitely in Maryland. Counsel for the plaintiffs have not filed any affidavits of plaintiffs' fathers in this case which contain relevant evidence of this intent. The

complaint itself is only verified by the plaintiffs with respect to the allegations that pertain to them (Paper No. 1). In addition, the verifications are only on "information and belief." While it is true that sworn and notarized pleadings may sometimes be considered the equivalent of affidavits in summary judgments proceedings, *Fletcher v. Norfolk Newspapers, Inc.*, 239 F.2d 169 (4th Cir. 1956); *Dabney v. Cunningham*, 317 F. Supp. 57 (E.D. Va. 1970), the verified pleadings in those cases contain only facts about which the pleader had personal knowledge and which concerned him directly. In order for a verified complaint to substitute for an affidavit, it must meet the standards of F. R. Civ. P. 56(e), that is it must be made "on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters therein." *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974); *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F.2d 150 (5th Cir. 1965); *Avery v. Norfolk & Western Railway Co.*, 52 F.R.D. 356 (N.D. Ohio 1971); 6 J. Moore, *Federal Practice*, ¶ 56.11[3], pp. 56-249-251 and ¶ 56.22[1], pp. 56-1303-1311 (1976). [Hereinafter, *Moore*]. The Verified Complaint in this case does not meet this standard and is inadequate to support plaintiffs' motion for summary judgment.

The fact that defendants filed no opposing affidavits setting out contradictory facts and merely relied on denials in their Answer (Paper No. 3, ¶¶ 16, 18, and 21) concerning facts relevant to plaintiffs' fathers' domicile is not significant in this case. Such denials would have been insufficient under F. R. Civ. P. 56(e) if the plaintiffs had met their burden of establishing that the relevant facts were not in dispute and that they were entitled to judgment as a matter of law. However, if a party moving for summary judgment fails to meet his burden, it is not incumbent upon the opposing party to do anything. *Adickes v. Kress & Co.*, 398 U.S. 144, 159-161, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); F. R. Civ. P. 56(c); 6 *Moore*, ¶ 56.11[3] p. 56-252, ¶ 56.23, p. 56-1390.

[15-17] Of course, under F. R. Civ. P. 56(c) plaintiffs may rely solely on the pleadings and do not have to file any supporting data if they choose not to do so. A motion made by a claimant on the basis of the complaint and answer is functionally equivalent to a motion for judgment on the pleadings under Rule12(c). *Schwartz v. Compagnie General Transatlantique,* 405 F.2d 270 (2d Cir. 1968); 6 *Moore,* ¶56.02[3], p. 56-29; ¶ 56.09; ¶ 56.11[1-1]; ¶ 56.11[2], p. 56-210. However, because of defendants' Answer has raised an issue of material fact with respect to the allegations in the Verified Complaint concerning plaintiffs' fathers' domiciles (Paper No. 3, ¶¶ 16, 18, and 21), plaintiffs may not prevail on this ground either. *Id.;* 2A *Moore,* ¶ 12.15. Since there is nothing in the entire record with respect to the fathers of plaintiffs Hogg and Moreno on which plaintiffs can rely in meeting their burden under Rule 56 on this factual question, this court cannot now enjoin the defendant from failing to classify students Hogg and Moreno as in-state students on the basis of the current record.

With respect to the father of plaintiff Otero, the record does contain some material filed as exhibits to the Verified Complaint which is entitled to consideration on this issue. In the process of attempting to convince the University of Maryland that plaintiff Otero was domiciled in Maryland, Rene Otero, plaintiff's father, partially completed under oath the University of Maryland form entitled "Petition for In-State Classification for Admission, Tuition and Charge-Differential Purposes." This form requires that the parent upon whom the student's domicile depends fill out sections II and IV of the form.

In section II Rene Otero has stated that he occupies real property in Maryland as his domicile on a year-round basis; that he has resided in Chevy Chase, Maryland since March 1, 1965; that all or substantially all of his possessions are in the State of Maryland; that Mrs. Otero is registered to vote in Maryland; that he has a Maryland driver's license and that his car is registered in Maryland. Rene Otero has also filed copies, certified by him to be true copies and sworn to before a notary, of his wife's

Maryland driver's license, his driver's license, his Maryland automobile registration for 3 automobiles, and his son's W-2 forms and Maryland Income Tax form, all listing Chevy Chase as their address. It is also undisputed from the record that Rene Otero is a G-4 alien employed with Inter-American Development Bank; that Mrs. Otero is an American citizen; that Rene Otero has not made any attempt to adjust his status from G-4 to resident alien; and that his current employer has a policy which would prevent him from making that adjustment while he is so employed. While all of these facts are material in the determination of Mr. Otero's domicile, the record is still deficient in evidence concerning his domiciliary intent. This crucial factor of intent is one which is particularly difficult to resolve on the basis of a bare written record and summary judgment can seldom be granted in cases where intent is in issue. *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. 1973); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974); *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). Therefore, even though the court has before it some evidence of Mr. Otero's domicile, summary judgment cannot be entered in favor of plaintiff Juan Pablo Otero.

E. Class Action

[18] Plaintiffs seek to maintain this suit as a class action under F. R. Civ. P. 23 (b)(2) which applies to suits in which:

> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

It is clear that the University's actions with respect to classifying G-4 aliens or their dependents as out-of-state students have been taken in accordance with official University policy and thus "on grounds generally applicable to the class." This case is then appropriately brought under 23(b)(2), assuming plaintiffs meet the

additional burdens imposed upon them to establish that this suit should proceed as a class action.

F.R. Civ. P. 23(a) provides 4 additional prerequisites for the maintenance of a class action. A class action may be maintained under Rule 23 only if:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The burden is on the plaintiffs to meet these and all of the requirements for the maintenance of a class action. *Carracter v. Morgan,* 491 F.2d 458 (4th Cir. 1973); *Poindexter v. Teubert,* 462 F.2d 1096 (4th Cir. 1972); *McAdory v. Scientific Research Instruments, Inc.,* 355 F. Supp. 468 (D. Md. 1973). In order to determine if plaintiffs have met their burden, the appropriate class which plaintiffs may represent must be determined.

Plaintiffs seek to represent a class consisting of all persons residing in Maryland who now attend or may in the future wish to attend the University of Maryland and who:

> (a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)-(G)(iv) or are financially dependent upon another person holding or named within such visa; or
>
> (b) pay no Maryland State income tax on a salary or wages from an international organization under the provisions of an international agreement to which the United States is a party or are financially dependent upon another person who does not pay such tax on such salary or wages for such reasons.

Plaintiffs seek declaratory and injunctive relief on behalf of the members of the class.

The thrust of the class aspects of plaintiffs' suit is to force the University to provide an opportunity for

prospective class members to demonstrate Maryland domicile. The court believes that the class which the plaintiffs seek to represent is too broad and must be limited to individuals satisfying criteria (a) above, residing in Maryland, who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish "in-state" status, or who are currently students in senior high schools in Maryland. It is these individuals against whom defendants' policies have already operated or would operate in the near future if they were to continue in effect.

Defendants' proposed limitation of the class to those students, either G-4's or their dependents, who have previously attempted to demonstrate Maryland domicile is too narrow. *Cf. Player v. State of Alabama, Dept. of Pensions and Security,* 400 F. Supp. 249, 253, 259 (M.D. Ala. 1975). Under the University's policy such an attempt would have been futile. Individuals who have been or will soon be discouraged from applying to the University of Maryland because of the University's policies regarding G-4 aliens are appropriate class members. *Cypress v. Newport News General and Nonsectarian Hospital Ass'n,* 375 F.2d 648, 653 (4th Cir. 1967); *Long v. Sapp,* 502 F.2d 34, 43 (5th Cir. 1974); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 254 (3rd Cir. 1975), *cert. denied* 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1976); *cf. Green v. Cauthen,* 379 F. Supp. 361, 371-2 (D.S.C. 1974).

The court finds no merit in defendants' preliminary argument that plaintiffs have abandoned the class action aspects of this suit. Plaintiffs' motion for class certification, filed on November 18, 1975, in a suit instituted on May 27, 1975, and before any hearings on the merits, was timely and allows the court to determine if class certification is appropriate within the "practicable" time limits of Rule 23(c)(1).

Since elsewhere in this opinion the court has already determined that plaintiffs do have standing to sue on their own behalf, defendants' objection to a class action suit on that ground must also fail. Defendants have not disputed, nor could they, that there are "questions of law . . . common to the class" as required by Rule 23(a)(2) since injunctive and declaratory relief for all the class members depends on the resolution of the same question of law, the legality of the University of Maryland's policy prohibiting G-4 aliens an opportunity to show that they are domiciled in Maryland. For the same reason, plaintiffs have also met the "typical claims" requirement of Rule 23(a)(3). Defendants have not attempted to argue to the contrary on this question. Finally, since plaintiffs' able and diligent counsel have adequately and fairly represented the interest of the class heretofore described and since the plaintiffs do not have interests antagonistic to those of the class, Rule 23(a)(4) has been satisfied. *Oxendine v. Williams,* 509 F.2d 1405 (4th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co., supra; American Finance System, Inc. v. Harlow,* 65 F.R.D. 94 (D. Md. 1974).

Defendants' major argument in opposition to class certification is that plaintiffs have not satisfied the "numerosity" requirement of Rule 23(a)(1) which requires the plaintiffs to demonstrate that joinder of all members is impracticable. This rule requires plaintiffs to make a positive showing that joinder is impracticable. *Tolbert v. Western Electric Co.,* 56 F.R.D. 108, 113 (N.D. Ga. 1972). Neither bare allegations of numerosity nor speculation as to the number of parties will suffice. *Kinsey v. Legg, Mason & Co., Inc.,* 60 F.R.D. 91 (D.D.C. 1973); *Tuma v. American Can Co.,* 367 F. Supp. 1178 (D. N.J. 1973). However, a plaintiff need not establish a class size with precision; it is sufficient if he presents some information from which the number of class members can be approximated. *Sims v. Parke Davis & Co.,* 334 F. Supp. 774 (D. Mich. 1971), *cert. denied* 405 U.S. 978, 92 S. Ct. 1196, 31 L. Ed. 2d 254 (1972). In this regard, the Advisory

Committee on the Federal Rules of Civil Procedure noted in discussing Rule 23(b)(2):

> ". . . Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose numbers are incapable of specific enumeration . . ." (citations omitted). 39 F.R.D. 73, 102.

Plaintiffs have submitted the affidavits of Arnold Weiss and John D. North (attachments to Paper No. 16) in support of their motion for class certification. Mr. Weiss's affidavit indicates that as of May, 1975, there were "157 children between the ages of 16-25 holding G-4 visas and dependent on and living in homes of Bank employees living in Maryland." Mr. North indicates that, based on a random sample at the end of 1975 of 15% of the World Bank's employees, just under 1,000 employees holding G-4 visas reside in Maryland. Mr. North, based on hard 1973 data, and ratios based on the 1975 sample, states that "there are today (Jan. 8, 1976), very approximately, nearly 500 dependent children, about one-third of them of the age of 15 or over, living in the homes of World Bank employees who hold G-4 visas and who reside in the State of Maryland." These data are as specific as are required, given the fact that this is a Rule 23(b)(2) class action suit and that plaintiffs have demonstrated the unconstitutionality of the University of Maryland's policies in question here. The court finds that plaintiffs have met the burden imposed on them by Rule 23(a)(1) to demonstrate that the class described *supra* is so numerous that joinder of all members would be impracticable. Therefore the court will grant plaintiffs' motion for class certification for a class to be defined as follows:

> All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of

Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

(a) hold or are named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa.

Declaratory relief is granted to the members of this class and defendants are enjoined from denying to the members of this class in-state status solely because they or their parents are holders of a visa under 8 U.S.C. § 1101(a)(15)(G)(iv).

Since the issue of the domicile of the fathers of the three named plaintiffs remains to be resolved, the court will not decide at this time the question of court costs and attorneys' fees.

Therefore, it is this 13th day of July, 1976, ORDERED:

(1) That defendant University of Maryland's motion for summary judgment is GRANTED and the University of Maryland is dismissed as a defendant in this case;

(2) That defendant Dr. Wilson H. Elkins' motion for summary judgment is DENIED;

(3) That plaintiffs' motion for class action determination is GRANTED and that the class is certified as described in the foregoing opinion;

(4) That plaintiffs' motion for summary judgment is partially GRANTED and partially DENIED;

(5) That the "In-State Policy" of the University of Maryland which denies to G-4 aliens by the use of an irrebuttable presumption of non-domicile the opportunity to establish "in-state" status is unconstitutional as it is in violation of the Due Process Clause of the Fourteenth Amendment; and

(6) That defendant Dr. Wilson H. Elkins is hereby enjoined from enforcing the University of Maryland's "In-State Policy" with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to "in-state" status for purposes of tuition and charge differential determinations.

In The United States District Court
for The District Of Maryland

Civil Action No. M-76-691

Juan Carlos Moreno, et al.,
Plaintiffs,

v.

University of Maryland and
Dr. Wilson H. Elkins,
President, University of
Maryland,
Defendants.

ORDER
(Filed August 3, 1976)

The Court having read and considered the Motion to Stay Order Pending Appeal and Memorandum in Support thereof, filed on behalf of Defendant Elkins on July 31, 1976;

And the Court having heard oral argument of counsel for the respective parties in open court on August 2, 1976, at which time it was represented by counsel for Defendant Elkins that were a stay granted (1) the University of Maryland, for the fall 1976 semester and any other semester that commences before the appellate process is concluded, as to each student whose status is currently determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1976 semester,

would have been granted but for the stay, would refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, were finally affirmed on appeal, and (2) the University of Maryland would publicize in some reasonable manner the condition that in order to be eligible to be considered for the refund described above, each student whose status is currently determined by a G-4 visa would be required to file with the University of Maryland a request for reclassification to "in-state" status prior to the last day available for registration for the fall 1976 semester;

And the Court having determined from the foregoing pleadings and arguments that the prerequisites for the granting of a stay pending appeal, stated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), have been satisfied;

IT IS, this 3rd day of August, 1976, by the United States District Court for the District of Maryland, for the reasons more fully set forth in open court,

ORDERED, That the Motion to Stay Order Pending Appeal be granted as prayed and that the effectiveness of paragraphs (5) and (6) of the Court's Order contained in its Opinion and Order filed July 13, 1976, be, and the same hereby is, STAYED.

s/ JAMES R. MILLER, JR.,
United States District Judge.

United States Court of Appeals
for The Fourth Circuit

No. 76-2049

Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg,
Appellees,

v.

Wilson H. Elkins, President, University of Maryland,
Appellant,

and

University of Maryland,
Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

Heard: April 4, 1977
Decided: April 28, 1977.

Before WINTER, BUTZNER, and HALL, Circuit Judges.

Jack T. Roach and Robert A. Zarnoch, Assistant Attorneys General of Maryland (Francis B. Burch, Attorney General of Maryland, David Feldman, Assistant Attorney General of Maryland on brief) for appellant; Alfred L. Scanlan (R. James Woolsey, John

D. Aldock and Shea and Gardner on brief) for appellees.

PER CURIAM:

The University of Maryland appeals the district court's ruling that, for purposes of determining admission, tuition rates, and charge differentials, students may not be denied "in state" status solely because they hold G-4 visas. For the reasons lucidly stated by the district court, we affirm that court's judgment. *See* Moreno v. University of Maryland, 420 F. Supp. 541 (D. Md. 1976).

Affirmed.

United States Court of Appeals
for The Fourth Circuit

No. 76-2049

Wilson H. Elkins, President,
University of Maryland,
Appellant,

v.

Juan Carlos Moreno, et al.
Appellees.

ORDER
(Filed May 23, 1977)

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Butzner and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II,
Clerk.

United States Court of Appeals
for The Fourth Circuit

No. 76-2049

Juan Carlos Moreno, Juan Pablo Otero and Clare B. Hogg,
Appellees,

v.

Wilson H. Elkins, President, University of Maryland,
Appellant,

and

University of Maryland,
Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

(Filed May 26, 1977)

Upon consideration of the appellant's motion for stay of mandate,

IT IS ACCORDINGLY ADJUDGED AND ORDERED that the mandate is stayed for a period of thirty (30) days unless the period is extended for cause shown on the same

terms as the district court originally granted its stay namely that should the appellant's petition for writ of certiorari prove unsuccessful, then those members of appellees' class who filed timely requests for reclassification to "in-state" status would receive a refund of excess fees paid during the pendency of the stay.

Entered for the panel consisting of Judges Winter, Butzner and Hall by direction.

For the Court,

WILLIAM K. SLATE II,
Clerk.

A True Copy,Test:
William K. Slate, II, Clerk,
By Marilyn J. Kocen,
Deputy Clerk.

OPINION

Supreme Court of the United States

Elkins, President, University of Maryland
v
Moreno et al.
(435 U.S. 647 (1978))

Certiorari to the United States Court of Appeals for the Fourth Circuit

No. 77-154. Argued February 22, 1978—Decided April 19, 1978

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 669.

David H. Feldman, Assistant Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Francis B. Burch*, Attorney General, *George A. Nilson*, Deputy Attorney General, and *Robert A. Zarnoch*, *Assistant Attorney General*.

Alfred L. Scanlan argued the cause for respondents. With him on the brief was *James R. Bieke*.*

* A brief for the American Council on Education et al. as *amici curiae* urging reversal was filed by *Sheldon Elliot Steinbach* and by the Attorneys General of their respective States as follows: *Robert F. Stephens* of Kentucky, *Francis X. Bellotti* of Massachusetts, *Anthony F. Troy* of Virginia, *Avrum Gross* of Alaska, *Carl R. Ajello* of Connecticut, *Richard R. Wier, Jr.*, of Delaware, *Arthur K. Bolton* of Georgia, *Wayne L. Kidwell*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondents, representing a class of nonimmigrant alien residents of Maryland,[1] brought this action against the University of Maryland[2] and its President, petitioner Elkins, alleging that the University's failure to grant respondents "in-state" status for tuition purposes violated various federal laws,[3] the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause. The District Court held for respondents on the ground that the University's procedures for

of Idaho, *Theodore L. Sendak* of Indiana, *William J. Guste, Jr.*, of Louisiana, *Joseph E. Brennan* of Maine, *A. F. Summer* of Mississippi, *John D. Ashcroft* of Missouri, *Paul L. Douglas* of Nebraska, *Robert List* of Nevada, *David H. Souter* of New Hampshire, *William F. Hyland* of New Jersey, *Toney Anaya* of New Mexico, *Louis J. Lefkowitz* of New York, *Rufus L. Edmisten* of North Carolina, *Allen I. Olson* of North Dakota, *James A. Redden* of Oregon, *Daniel R. McLeod* of South Carolina, *William Janklow* of South Dakota, *Robert B. Hansen* of Utah, *M. Jerome Diamond* of Vermont, *Chauncey H. Browning, Jr.*, of West Virginia, and *V. Frank Mendicino* of Wyoming.

[1] The class certified by the District Court differs from that alleged in the complaint. As certified, the class is defined as:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

"(a) hold or are named within a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa." *Moreno v. University of Maryland*, 420 F. Supp. 541, 564 (Md. 1976).

[2] The University was dismissed from the suit on the authority of *Monroe v. Pape*, 365 U.S. 167 (1961). See 420 F. Supp., at 548-550.

[3] The complaint alleged that petitioner's conduct violated 42 U. S. C. §§ 1981, 1983, 2000a, 2000a-1, 2000a-3, 2000d. App. 3A. Jurisdiction was predicated on 28 U.S.C. §§ 1343 (3), 1343 (4). The District Court proceeded on the premise that 42 U.S.C. § 1983 and the cited sections of Title 28 gave jurisdiction and a cause of action. See 420 F. Supp., at 548. Neither of these rulings is now in dispute.

determinining in-state status violated principles established in *Vlandis v. Kline*, 412 U. S. 441 (1973), and the Court of Appeals affirmed. *Moreno v. University of Maryland*, 420 F. Supp. 541 (Md. 1976), affirmance order, 556 F.2d 573 (CA4 1977). We granted certiorari to consider whether this decision was in conflict with *Weinberger v. Salfi*, 422 U. S. 749 (1975). 434 U. S. 888 (1977).

Because we find that the federal constitutional issues in this case cannot be resolved without deciding an important issue of Maryland law "as to which it appears . . . there is no controlling precedent in the Court of Appeals of [Maryland]," Md. Cts. & Jud. Proc. Code Ann. § 12-601 (1974), we first decide some preliminary issues of federal law and then certify the question of state law set out *infra*, at 668-669, to the Maryland Court of Appeals.

I

In 1973 the University of Maryland adopted a general policy statement with respect to "In-State Status for Admission, Tuition, and Charge-Differential Purposes." In relevant part, this statement provides:

> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:
>
> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.
>
> "b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." Brief for Petitioner 7.

The term "domicile" is defined as "a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland." *Id.*, at 8. The policy statement also sets out eight factors to be considered in determining domicile, of which one is whether a student, or the persons on whom he is dependent, pays "Maryland income tax on all earned income including all taxable income earned outside the State." *Id.*, at 9.

In addition to establishing criteria for conferring in-state status, the general policy statement establishes an administrative regime in which a person seeking in-state status initially files documentary information setting out the basis for his claim of domicile. See *id.*, at 8-9. If the claim is denied, the person seeking in-state status may appeal, first through a personal interview with a "campus classification officer," then to an "Intercampus Review Committee (IRC)," and finally to petitioner Elkins, as President of the University. See *id.*, at 9-10.

II

In 1974, respondents Juan C. Moreno and Juan P. Otero applied for in-state status under the general policy statement. Each respondent was a student at the University of Maryland and each was dependent on a parent who held a "G-4 visa," that is, a nonimmigrant visa granted to "officers, or employees of . . . international organizations, and the members of their immediate families" pursuant to 8 U.S.C. § 1101.(a)(15)(G)(iv) (1976 ed.).[4] Initially, respon-

[4] "(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

"(G) . . . (iv) officers, or employees of . . . international organizations [recognized under the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families."

Respondents Moreno and Otero are dependents of employees of the Inter-American Development Bank. App. 6A, 7A. Respondent Hogg is the dependent of an employee of the International Bank for Reconstruction and Development. *Id.*, at 9A. The

dent Moreno was denied in-state status because "neither Mr. Manuel Moreno nor his son, Juan Carlos, are Maryland domiciliaries." Record 41. Respondent Otero was denied in-state status because he was neither a United States citizen nor an alien admitted for permanent residence. *Id.*, at 80.

These respondents took a "consolidated appeal" to the IRC, which also denied them in-state status in a letter which stated:

> "The differential in tuition for in-state and out-of-state fees is based upon the principle that the State of Maryland should subsidize only those individuals who are subject to the full scope of Maryland tax liability. Such taxes support in part the University. The University of Maryland's present classification policies rest upon this principle of cost equalization. In examining the particulars of your case it is felt that neither you nor your parents are subject to the full range of Maryland taxes (e.g., income tax) and therefore the University must classify you as out-of-state with the consequential higher tuition rate.
>
> "You have raised the question of domicile. It is our opinion that a holder of a G-4 visa cannot acquire the requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile." *Id.*, at 51, 86.

A final appeal was made to President Elkins, who advised Moreno and Otero as follows:

> "It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education

complaint states that respondent Moreno has resided in Maryland for 15 years, Otero for 10 years, and Hogg for 5 years. *Id.*, at 4A.

between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as 'out-of-state.'

"The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification." App. 12A.

Respondent Clare B. Hogg's experience was similar. Her application for in-state status was initially refected because:

"[T]he policy for the determination of in-state status limits the ability to establish an in-state classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

"Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria [*sic*] in determination of domicile." Record 106.

However, the IRC stated on appeal:

"It is the opinion of the IRC that a holder of a non-immigrant visa, including the G-4 visa you hold, cannot acquire the requisite intent to reside per-

manently in Maryland, such intent being necessary to establish domicile." *Id.*, at 111.

No mention was made of failure to pay taxes or of repondents' nonimmigrant status. See *ibid.* Yet on final appeal to President Elkins, these reasons, as well as respondent Hogg's lack of domicile, were recited in a letter virtually indentical to those sent respondnets Moreno and Otero as grounds for denying in-state status. See App. 13A.

Unable to obtain in-state status through the University's administrative machinery, respondents filed a class action against the University and petitioner Elkins, seeking a declaration that the class should be granted in-state status and seeking permanently to enjoin the University from denying in-state status to any present or future class member on the ground that such class member or a parent on whom such class member might be financially dependent

> "(a) is the holder of a G-4 visa; (b) pays no Maryland State income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party; or (c) is not domiciled in the State of Maryland by reason of holding such a visa or paying no Maryland State income tax on such salary or wages under the provisions of such a treaty." *Id.*, at 11A.

The District Court, on cross-motions for summary judgment, limited the relief granted to a declaration and enforcing injunction restraining petitioner Elkins from denying respondents "the opportunity to establish 'in-state' status" solely because of an "irrebuttable presumption of non-domicile." 420 F. Supp., at 565. The court specifically refused to grant respondents in-state status, holding that the facts with respect to the respondents' fathers, on whom each respondent was dependent, were in dispute. *Id.*, 564-565. Similarly, the court did not indicate whether the University could or could not exclude respon-

dents because their fathers paid no Maryland state income taxes.[5]

[5] The District Court did not set out reasons for denying this relief. However, it must have believed that the University would not exclude respondents from in-state status solely for cost-equalization reasons if they otherwise qualified for Maryland domicile. If this was not the case, the District Court could not, as it did, see 420 F. Supp., at 560, have found it unnecessary to pass on respondents' argument that the Supremacy Clause prohibits the States from penalizing those who seek to avail themselves of tax exemptions granted by federal treaties. Moreover, an examination of the pleadings before the District Court strongly suggests that, notwithstanding the correspondence set out above, the University has disavowed any intention to exclude respondents from in-state status solely because they, or the persons on whom they are dependent, paid no state income taxes. Thus, the University unequivocally denied respondents' allegation that

"(b students whose parents do not pay Maryland income taxes on income earned from an international organization under the provisions of an international treaty . . . may not be granted in-state status because of the 'principle of cost equalization' and because the University's 'policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not' . . . ." App. 5A (Complaint ¶13 (b)).

See App. 16A (Answer ¶13). The University similarly disavowed any intent to exclude respondents solely on the basis of failure to pay state income taxes in its responses to respondents' requests for admission. See Record 134 (¶2(d)) (denying that tax exemption given some G-4 visa holders is "relevant to the determination made pursuant to the . . . University of Maryland policy"); *id.*, at 135 (¶3 (d)) (same); *id.*, at 139 (¶6 (d)) (same); *id.*, at 136 (¶4 (d)) (denying the relevance for in-state tuition purposes of the fact that a person may pay Maryland state taxes on less than 50% of his earned income); *id.*, at 141 (¶8 (d)) (same); *id.*, at 142 (¶9 (d)) (same); *id.*, at 140 (¶7 (d)) (denying the relevance for in-state tuition purposes of the fact that a person may pay Maryland state taxes on only "unearned" income). Finally, the University admitted as fact that

"an 'immigrant student' who is financially dependent upon a parent who is an immigrant lawfully admitted for permanent residence . . . may be granted in-state status, whether or not the parent on whom such student is financially dependent currently pays Maryland income tax, provided that such parent

With respect to the "irrebuttable presumption" issue, the District Court first held that, although each respondent had been allowed to submit a complete statement of facts supporting his or her claim of domicile to University authorities, there had been no individualized hearing because the University had a "predetermined conclusion concerning the domicile of a G-4 alien," *id.*, at 555, namely, that a G-4 could not have the requisite intent to establish domicile. It then ruled that aliens holding G-4 visas could as a matter of Maryland common law become Maryland domiciliaries so long as such aliens were legally capable of changing domicile as a matter of *federal* law. See *id.*, at 555-556. An examination of the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*, demonstrated that G-4 aliens, as distinguished from some other classes of aliens, had the legal capacity to change domicile as a matter of federal law. See 420 F. Supp., at 556-559. Accordingly, the University's irrebuttable presumption that G-4 aliens could not become Maryland domiciliaries was not universally true. Since "reasonable alternative means of making the crucial [domicile] determination," *Vlandis v. Kline*, 412 U. S., at 452, were readily at hand, the University's policy violated the Due Process Clause of the Fourteenth Amendment. See 420 F. Supp., at 559-560. These conclusions were affirmed by the Court of Appeals for the Fourth Circuit, which adopted the reasoning of the District Court. App. to Pet. for Cert. 54a-55a.

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can exhibit all of the other relevant domiciliary criteria . . . ." *Id.*, at 142.

Since no party has suggested a difference between immigrant and nonimmigrant aliens other than the possibility that the latter cannot become domiciliaries, the University's admission tends to confirm that the tax issue is not determinative of in-state status for any group of aliens.

For the reasons set out above, we, like the District Court, do not now decide whether the University would be barred by the Supremacy Clause from denying in-state status on tax grounds.

III

A

In this Court, petitioner argues that the University's in state policy should have been tested under standards set out in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and its progeny, since in petitioner's view these cases have effectively overruled *Vlandis*. As an alternative argument, petitioner asserts that the District Court should be reversed because its conclusions on points of Maryland and federal law were erroneous and in fact it is universally true that a G-4 visa holder cannot become a Maryland domiciliary.

Respondents reply that *Vlandis* was distinguished, not overruled, by *Salfi*, and, as distinguished, *Vlandis* covers this case. Moreover, they assert that the District Court correctly interpreted federal and Maryland law. Because the University's policy would on this view discriminate against a class of aliens who could become Maryland domiciliaries, they also argue, as they did in the District Court,[6] that they should prevail on equal protection grounds even if they cannot prevail under *Vlandis*.[7] Cf. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

Although the parties argue this case in terms of due process, equal protection, and *Vlandis* versus *Salfi*, the gravamen of their dispute is unquestionably whether, as a matter of federal and Maryland law, G-4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland. The University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement, its "paramount" and controlling concern is with domicile as defined

[6] The District Court did not pass on the equal protection argument. See 420 F. Supp., at 560.

[7] The respondents also argue that the University's policy is invalid under the Supremacy Clause since control over aliens and over foreign relations is vested exclusively in the Federal Government. We have no need to reach this argument at this time.

by the courts of Maryland.[8] It has eschewed any interest in creating a classwide exolusion based solely on nonimmi-

[8] Petitioner will be surprised to learn from the dissent, see *post*, at 672-676, that the University's treatment of respondents is not really determined by the Maryland common law of domicile and therefore that this case is governed by *Weinberger v. Salfi*, 422 U.S. 749 (1975), not *Vlandis v. Kline*, 412 U.S. 441 (1973). For petitioner's view of the University's policy, contrary to that suggested by the dissent, has consistently been: "The Defendant University distinguishes between *domiciliaries* and *non-domiciliaries* of the State of Maryland . . . . This represents a policy decision of the Board of Regents of the University, which has been implemented in the rules and guidelines of the Policy Statement . . . ." Record 215 (emphasis added). And again: "The wording of the 'In-State' policy is structured so as to initially deny 'in-state' status to non-immigrant aliens. This structure incorporates the determination that under the law and definition of *domicile as established and applied by Maryland courts*, non-immigrant aliens cannot display the intent to permanently reside within the State which is requisite to establishing Maryland domicile." *Id.*, at 217 (emphasis added). And again: "[The University's] actions and policy *rest upon a definition, not a presumption*. Defendants have denied Plaintiffs 'in-state' status based on an evaluation of their domicile under Maryland law: the existence of a G-4 visa is merely a single operative fact, *albeit paramount, which is placed in the context of what Defendants have determined to be the definition of domicile established by the Maryland courts*." *Id.*, at 231 (second emphasis added). And again: "This distinction [between immigrant and nonimmigrant aliens] was based upon a reading of the Maryland law of domicile in conjunction with the terms and conditions of the non-immigrant visas described in 28 [*sic*] U. S. C. § 1101 (a)(15)(A) through (L), a determination thereby having been made that non-immigrants do not have the intent requisite for establishing Maryland domicile. . . . That State University's [*sic*] can establish such . . . 'domicile' policies and make distinctions between domiciliaries and non-domiciliaries is well established . . . ." *Id.*, at 233.

Indeed, respondents argued below against abstention, see n. 15, *infra*, on the same grounds now argued by our Brother REHNQUIST against certification, namely: "[T]he Maryland common law of domicile is not at issue in this case. No 'clarification' of the Maryland common law of domicile is needed. Such common law principles, standing alone, do not set the tuition charged by the University of Maryland." Record 272. And petitioner countered: "What [respondents] apparently fail to

grant status[9] or, apparently, on the fact that many G-4 aliens receive earned income that is exempt from Maryland taxation.[10] Because petitioner makes domicile the "paramount" policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State "purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue." *Weinberger v. Salfi*, 422 U.S., at 771.[11]

If we are to reverse the courts below, therefore, we must overrule or further limit *Vlandis* as, of course, petitioner has asked us to do. Before embarking on a review of the constitutional principles underlying *Vlandis*, however, proper concern for *stare decisis* joins with our longstanding

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understand is that the [University's] 'In-State Policy' is structured upon and reflects [the University's] understanding of the Maryland common law of domicile." *Id.*, at 340.

[9] There can be no doubt that, notwithstanding the policy statement's express reservation of in-state status to United States citizens and immigrant aliens, see *supra*, at 651, the University has no policy of excluding nonimmigrant aliens simply because they lack immigrant status under federal law. Petitioner's answer unequivocally states that the University has not "denied" nor does it "continu[e] to deny in-state status to all students who neither are United States citizens nor hold immigrant visas," App. 16A, although such an across-the-board denial would be required by the University's policy if it placed independent significance on immigrant status. Moreover, petitioner tells us that "the fact of alienage is completely irrelevant in itself to the issues controlling a determination of domicile." Record 232.

[10] See n.5, *supra*. Indeed, although the dissent suggests that petitioner might bar respondents on cost-equalization grounds, see *post*, at 672-673, it is clear that petitioner has not done this although nothing in the District Court's injunction prohibits petitioner from doing so. See *supra*, at 655-656, and n.5.

[11] In fact, the University allows evidence to be submitted bearing on respondents' claims of domicile — it simply does not evaluate that evidence.

policy of avoiding unnecessary constitutional decisions to counsel that a decision on the continuing vitality of *Vlandis* be avoided unless it is really necessary. See, *e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 146-151 (1976); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *Harrison v. NAACP*, 360 U.S. 167, 177 (1959); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); cf. *Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). So far, no such showing of necessity has been made out.[12] If G-4 aliens cannot become domiciliaries, then respondents have no due process claim under either *Vlandis* or *Salfi* for any "irrebuttable presumption" would be universally true. On the other hand, the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy "to accommodate" G-4 aliens were the Maryland courts to hold that G-4 aliens can have the requisite intent.[13]

[12] Moreover, respondents' equal protection claim turns on whether it is in fact true that G-4 aliens can become domiciliaries of Maryland. If they cannot, the constitutional issues that would be raised are materially different from those briefed or argued here. For this reason, we also think certification proper. See, *e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 146-151 (1976).

[13] "The core of Plaintiffs' cause of action is their belief that under Maryland law a G-4 non-immigrant alien can be domiciled in this State. A judicial determination in the negative would foreclose their Constitutional and statutory arguments; *a determination in the affirmative would require the University's Board of Regents to rewrite the In-State policy to accommodate this category of domiciliaries.*" Record 239-240 (emphasis added).

Similar sentiments are expressed in petitioner's brief in this Court. See Brief, at 11, 12, 28, 30, 34, and 35 n.20. And petitioner's counsel stated at oral argument that if the Court of Appeals of Maryland determined that a person with a G-4 visa is capable of forming the requisite intent to establish domicile, "the odds are reasonably high that the case would become moot because the university would change its policy, but that judgment is one that would be made by the regents . . . ." Tr. of Oral Arg. 14-15.

Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case. Since the resolution of this question turns on federal statutory law and Maryland common law as to each of which there are no controlling precedents[14] we first set out the correct meaning of federal law in this area and then *sua sponte* certify[15] this case to the Court of Appeals of Maryland in order to clarify state-law aspects of the domicile question.[16]

[14] No recent Maryland case has been cited in the briefs either here or below. In addition, petitioner's counsel, an Assistant Attorney General of Maryland, stated at oral argument that there "are no Maryland decisions one way or the other." *Id.*, at 10.

[15] Although petitioner asked the District Court to abstain, Record 211, he did not ask that court to certify the state-law question of domicile to the Maryland Court of Appeals. We need not decide whether the District Court's failure to abstain was erroneous, for, as we noted in *Bellotti v. Baird, supra,* at 150-151:

"This Court often has remarked that the equitable practice of abstention is limited by considerations of '"the delay and expense to which application of the abstention doctrine inevitably gives rise"' . . . As we have also noted, however, the availability of an adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.'. . .

". . . [T]he availability of certification greatly simplifies [*Pullman* abstention] analysis." (Footnotes omitted.)

[16] Although it is our frequent practice to defer to a construction of state law made by a district court and affirmed by a court of appeals whose jurisdiction includes the State whose law is construed, see, *e.g., Bishop v. Wood,* 426 U.S. 341, 345-346, and 346-347, n.10 (1976) (collecting cases), we do not do so here for two reasons. First, the question of who can become a domiciliary of a State is one in which state governments have the highest interest. Many issues of state law may turn on the definition of domicile: for example, who may vote; who may hold public office; who may obtain a divorce; who must pay the full spectrum of state taxes. In short, the definition of domicile determines who is a full-fledged member of the polity of a State, subject to the full power of its laws and participating (except, of course, with respect to aliens) fully in its governance. Second, the status of the many foreign nationals living in Maryland is of great

B

Petitioner has argued, and respondents do not appear to disagree, that, if as a matter of federal law a nonimmigrant alien is required to maintain a permanent residence abroad or must state that he will leave the United States at a certain future date, then such an alien's subjective intent to reside permanently or indefinitely in a State would not create the sort of intent needed to acquire domicile. It is not clear whether this argument is based on an understanding of the common law of Maryland defining intent or whether it is based on an argument that federal law creates a "legal disability," see Restatement (Second) of Conflict of Laws § 15 (1) (1971), which States are bound to recognize under the Supremacy Clause. See *Nyquist v. Mauclet*, 432 U.S., at 4; *id.*, at 20 n.3 (REHNQUIST, J., dissenting); *Seren v. Douglas*, 30 Colo. App. 110, 114-115, 489 P.2d 601, 603 (1971) (semble); *Gosschalk v. Gosschalk*, 48 N.J. Super. 566, 574-575, 138 A.2d 774, 779 (semble), aff'd, 28 N.J. 73, 145 A.2d 327, (1958); *Gosschalk v. Gosschalk*, 28 N.J. 73, 75-82, 145 A.2d 327, 328-331 (1958) (dissenting opinion). But cf. *Williams v. Williams*, 328 F. Supp. 1380, 1383 (V.I. 1971). In any case, we need not decide the effect of a federal law restricting nonimmigrant aliens postulated above, since it is clear that Congress did not require G-4 aliens to maintain a permanent residence abroad or to pledge to leave the United States at a date certain.

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importance to Maryland because it potentially affects Maryland's relations with the Federal Government, other state and local governments in the greater District of Columbia area, and foreign nations. In a federal system, it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it. In so doing, we emphasize that we do not in any way suggest that the District Court's determination of Maryland law was incorrect.

After extensive study, Congress passed the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.* (1976 ed.), as a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents. See H. R. Rep. No. 1365, 82d Cong., 2d Sess., 27 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess., 1-2 (1952). As amended in 1976, the Act establishes two immigration quotas, one for the Eastern and one for the Western Hemisphere.[17] The object of the quotas is to limit the number of aliens who can be admitted to the United States for permanent residence. To this end, the Act divides aliens into two classes. The first class, immigrant aliens, includes every alien who does not fall into an exclusion established by § 101 (a)(15) of the Act, 66 Stat. 167, as amended, 8 U.S.C. § 1101 (a)(15) (1976 ed.). Except for immigrant aliens who are "immediate relatives of United States citizens" or "special immigrants defined in section 101 (a)(27),"[18] each alien admitted for permanent residence or who later becomes eligible for permanent residence is chargeable against a quota and no alien can be granted permanent residence status unless a quota allocation is available.[19] However, it is important to note that there is no requirement in the Act that an immigrant alien have an intent to stay permanently in the United States.

The second class of aliens, nonimmigrant aliens, is established by § 101 (a)(15) of the Act. This section creates 12 subcategories of aliens who may come to the United States without need for a quota allocation. See §§ 101 (a)(15)(A)-(L). Congress defined nonimmigrant classes to provide for the needs of international diplomacy, tourism, and commerce, each of which requires that aliens be

[17] Immigration and Nationality Act Amendments of 1976, § 2, 90 Stat. 2703, amending § 201 of the 1952 Act, as amended, 8 U.S.C. § 1151 (1976 ed.).

[18] § 201 of the 1952 Act, as amended, 8 U.S.C. § 1151 (1976 ed.).

[19] 8 U.S.C. § 1151 (1976 ed.).

admitted to the United States from time to time and all of which would be hampered if every alien entering the United States were subject to a quota and to the more strict entry conditions placed on immigrant aliens.[20]

Although nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States. For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States. Thus, the 1952 Act defines a visitor to the United States as "an alien . . . having a residence in a foreign country which he has no intention of abandoning" and who is coming to the United States for business or pleasure. § 101 (a)(15)(B). Similarly, a nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . ." § 101 (a)(15)(F). See also § 101 (a)(15)(C) (aliens in "immediate and continuous transit"); § 101 (a)(15)(D) (vessel crewman "who intends to land temporarily"); § 101 (a)(15)(H) (temporary worker having residence in foreign country "which he has no intention of abandoning").

By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently. Moreover, since a nonimmigrant alien who does not maintain the conditions attached to his status can be deported, see § 241 (a)(9) of the 1952 Act, 66 Stat. 206, 8 U.S.C. § 1251 (a)(9) (1976 ed.), it is also clear that Congress intended that, in the absence of an adjustment of

[20] See S. Rep. No. 1137, 82d Cong., 2d Sess., pt. 1, p. 13 (1952); H. R. Rep. No. 1365, 82d Cong., 2d Sess., 52 (1952); H. R. Rep. No. 91-851, pp. 5-7 (1970).

status (discussed below), nonimmigrants in restricted classes who sought to establish domicile would be deported.

But Congress did *not* restrict every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on aliens admitted under § 101 (a)(15)(G)(iv).[21] Since the 1952 Act was intended to be a comprehensive and complete code, the conclusion is therefore inescapable that, where as with the G-4 class Congress did not impose restrictions on intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile. Congress' intent is confirmed by the regulations of the Immigration and Naturalization Service, which provide that G-4 aliens are admitted for an indefinite period — so long as they are recognized by the Secretary of State to be employees or officers (or immediate family members of such employees or officers) of an international treaty organization. See 8 CFR § 214.2 (g) (1977); 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.13b, p. 2-101 (rev. ed. 1977). Whether such an adoption would confer domicile in a State would, of course, be a question to be decided by the State.

Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa. Of course, should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status. *Ibid.* Nonetheless, such an alien would not necessarily be subject to deportation nor would he have to leave and re-enter the country in order to become an immigrant.

[21] See n.4, *supra*.

Beginning with the 1952 Act, Congress created a mechanism, "adjustment of status," through which an alien already in the United States could apply for permanent residence status. See § 245 of the 1952 Act, 66 Stat. 217, as amended, 8 U.S.C. § 1255 (1976 ed.).[22] Prior to that time, aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad. See 2 Gordon & Rosenfield, *supra*, at § 7.7. Although adjustment of status is a matter of grace, not right, the most recent binding decision[23] of the Board of Immigration Appeals states:

> "Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, *etc.*, will be considered as countervailing factors meriting favorable exercise of administrative discretion. *In the absence of adverse factors, adjustment will ordinarily be granted,* still as a matter of discretion." *Matter of Arai*, 13 I. & N. Dec. 494, 496 (1970) (emphasis added), modifying *Matter of Ortiz-Prieto*, 11 I. & N. Dec. 317 (BIA 1965).

The adverse factors referred to by the Board include such things as entering the United States under fraudulent circumstances[24] or committing crimes while in the United

[22] Until the Immigration and Nationality Act Amendments of 1976, n.17, *supra*, nonimmigrant aliens whose country of origin was in the Western Hemisphere were excluded from adjustment of status. Section 6 of the 1976 Amendments, 90 Stat. 2705, removed this restriction. See 8 U.S.C. § 1255 (1976 ed.).

[23] Opinions of the Attorney General, the Board of Immigration Appeals, and of Immigration and Naturalization Service officers published in Administrative Decisions Under Immigration and Nationality Laws of the United States are "binding on all officers and employees of the Service in the administration of the [1952] Act." 8 CFR §§ 3.1 (g), 103.3 (e), and 103.9 (a) (1977).

[24] See, *e.g.*, *Matter of Rubio-Vargas*, 11 I. & N. Dec. 167 (BIA 1965); *Matter of Vega*, 11 I. & N. Dec. 337 (BIA 1965); *Matter of*

States.[25] There is no indication that any named respondent is subject to any such adverse factor, and, given each named respondent's alleged length of residence in the United States,[26] it would appear that any respondent could adjust his or her status to that of a permanent resident without difficulty.[27]

C

For the reasons stated above, the question whether G-4 aliens can become domiciliaries of Maryland is potentially dispositive of this case and is purely a matter of state law. Therefore, pursuant to Subtit. 6 of Tit. 12 of the Md. Cts. & Jud. Proc. Code,[28] the following question is certified to the Court of Appeals of Maryland:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as

Diaz-Villamil, 10 I. & N. Dec. 494 (BIA 1964); *Ameeriar v. INS*, 438 F.2d 1028 (CA3), cert. dismissed, 404 U.S.801 (1971). See also *Matter of Barrios*, 10 I. & N. Dec. 172 (BIA 1963); *Brownell v. Carija*, 102 U.S. App. D. C. 379, 254 F.2d 78 (1957); *Brownell v. Gutnayer*, 94 U.S. App. D. C. 90, 212 F.2d 462 (1954).

[25] See, *e.g.*, *Matter of Marchena*, 12 I. & N. Dec. 355 (Regional Comm'r 1967); *Matter of F——*, 8 I. & N. Dec. 65 (Asst. Comm'r 1958). See generally Annot., 4 ALR Fed. 557 (1970).

[26] See n.4, *supra*.

[27] Cf. *Matter of Penaherrera*, 13 I. & N. Dec. 334 (Dist. Director 1969). Although this is a class action, see n.1, *supra*, there is no reason on the present record to believe that G-4 aliens as a class are less qualified for adjustment of status than are the class representatives.

[28] "§ 12-601. Jurisdiction granted to Court of Appeals.

"The Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States . . . when requested by the certifying court if there is involved in any proceeding before the certifying court a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying

a matter of state law of becoming domiciliaries of Maryland?"[29]

*So ordered**

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The University of Maryland, like all state universities, differentiates in tuition between "in-state" and "out-of-state" students. The two categories of students are delineated in the University's general policy statement on "In-State Status for Admission, Tuition, and Charge-Differential Purposes." Part 1 of the policy statement provides:

> "It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes *to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:*
>
> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for

court there is no controlling precedent in the Court of Appeals of this state."

"§ 12-602. Invocation of subtitle.

"This subtitle may be invoked by an order of any court referred to in § 12-601 upon the court's own motion or upon the motion of any party to the cause."

"§ 12-603. Certification order.

"(a) *Form.* — A certification order shall set forth:

"(1) The question of law to be answered; and

"(2) A statement of all facts relevant to the question certified showing fully the nature of the controversy in which the question arose."

[29] The majority rule appears to be that within a single State "the rules of domicile are the same for all purposes." Restatement (Second) of Conflict of Laws, § 11, Comment *o*, p. 47 (1971). Should Maryland not follow this rule, we presume that the Court of Appeals will direct its attention to domicile for the purposes of this case.

* [REPORTER'S NOTE: Subsequently, the Maryland Court of Appeals answered the certified question, and a supplemental decision was rendered in *Toll v. Moreno*, 441 U. S. 458 (1979).]

at least six consecutive months prior to the last day available for registration for the forthcoming semester[, or]

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." Brief for Petitioner 7 (emphasis added).

As is clear from the policy statement, domicile is not the sole criterion upon which the University of Maryland determines "in-state" tuition status. The University first looks to see whether the student is either a "United States citizen" or an "immigrant alien lawfully admitted for permanent residence"; if the student satisfies this initial requirement, the University must then determine whether the student (or his parents) are domiciled in Maryland.

Respondents are nonimmigrant aliens who hold G-4 visas. Pursuant to the University's tuition policy, they were denied lower in-state tuition rates despite the fact that they and their parents reside in Maryland. As explained by the Assistant Director of Admissions in a letter to respondent Clare B. Hogg, the principal reason for classifying respondents as out-of-state students for purposes of tuition was nonimmigrant status; as a secondary factor, the Assistant Director of Admissions noted that respondents would probably not be able to pass the second hurdle of domicile:[1]

"[T]he policy for determination of in-state status limits the ability to establish an in-state classification

[1] In rejecting the appeals of respondents Moreno and Otero from tuition decisions of the Intercampus Review Committee, petitioner President of the University of Maryland also emphasized that the University precludes nonimmigrant aliens from in-state tuition status for reasons other than solely domicile:

"It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens

to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

"Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria in determination of domicile." Record 106.

Respondents brought suit in federal court alleging that the University's in-state tuition policy is, among other things, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court for the District of Maryland held that the University's policy creates an irrebuttable presumption in contravention of *Vlandis v. Kline*, 412 U.S. 441 (1973). The Court of Appeals for the Fourth Circuit affirmed. We granted certiorari to decide whether the lower courts were correct in their holding.

The Court, rather than deciding the due process issue upon which certiorari was granted, today certifies the following question to the Court of Appeals of Maryland:[2]

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lawfully admitted for permanent residence. *Furthermore*, such individuals (or their parents) must display Maryland domicile.

. . .

"The University's classification policy *also* distinguishes between domiciliaries and non-domiciliaries of Maryland." App. 12A (emphasis added).

See also Record 34, 55, 80, and 115.

[2] As the Court notes, *ante*, at 668-669, n.28, the question certified to the Court of Appeals of Maryland may not be answerable by a simple "yes" or "no." The Court asks as a general matter whether respondents are "incapable as a matter of state law of becoming domiciliaries of Maryland." The answer may be that they are incapable of establishing Maryland domicile for university tuition purposes but are still capable of becoming domiciliaries for other purposes such as divorce and personal jurisdiction. While in *Williamson v. Osenton*, 232 U.S. 619, 625 (1914), this Court expressed doubt whether the

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?"

I would unhesitatingly join the Court's certification if I felt that resolution of the question posed to the Court of Appeals of Maryland were necessary to decide the issue before us. But I am convinced that we can decide the due process issue without resolution of Maryland domicile law and thus that certification will only result in needless delay.

The University apparently classifies nonimmigrant aliens as out-of-state students for a number of reasons. All parties agree that a major factor is the University's conclusion that nonimmigrant aliens lack the legal capacity to become Maryland domiciliaries for tuition purposes. But this is not the *only* consideration underlying the classification, as is evidenced by the fact that citizenship or immigrant status is a requirement separate from and preceding domicile. According to the President of the University of Maryland, for example, the classification policy also "reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not." App. 12A. Holders of G-4 nonimmigrant visas are exempt from state income tax. By charging such nonimmigrant aliens higher out-of-state tuition, the University is able to better "equalize" the cost of education.[3]

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definition of domicile ever varies depending on the purpose for which domicile is being used, various state-court opinions since 1914 have shown that observation to be incorrect. See, *e.g.*, *In re Estate of Jones*, 192 Iowa 78, 82, 182 N.W.229 (1921). The relevant issue in this case, of course, is whether respondents may establish Maryland domicile for university purposes, not whether they may become domiciled for purposes of divorce, etc.

[3] As the Court recognizes, *ante*, at 656-657, n.5, the University of Maryland does not presently preclude students from

Because the University's conclusion as to domicile plays a major role in its decision not to award nonimmigrant aliens in-state tuition status, counsel for petitioner admitted at oral argument that "it is entirely possible that the university would change its policy" in the face of a contrary decision by the Maryland Court of Appeals. Tr. of Oral Arg. 9. But a change in the University's in-state tuition policy would be neither automatic nor inescapable. The University might still decide that the other considerations such as cost equalization by themselves dictate continuation of the current policy. According to counsel for petitioner, "that judgment is one that would be made by the regents, and [as] I have suggested previously . . . it is well within the discretion of the regents." *Id.*, at 15.

The above facts clearly establish that the University of Maryland has not created an irrebuttable presumption. The University has not determined that domicile is the sole relevant factor in determining tuition rates and then prevented respondents from presenting proof on the question of domicile.[4] Instead, the University has decided that,

in-state tuition status *solely* because their parents pay no state income tax. However, the record clearly demonstrates that cost equalization is *one* of the major concerns that have led the University to charge higher tuition rates to nonimmigrant aliens.

[4] The Court does not appear to argue that domicile is the *sole* reason for the University of Maryland's out-of-state classification of nonimmigrant aliens. Instead, the Court concludes that domicile is the "'paramount' and controlling concern" of the University. *Ante*, at 659, and n.8. The Court supports its conclusions not with citations from the pleadings or affidavits of the parties but with references to briefs and memoranda filed by their counsel. Counsel for petitioner is, of course, charged with the legal defense of the validity of the policy statement promulgated by the Board of Regents and enforced by petitioner, but counsel is not authorized, in the absence of more authority than is shown here, either to rewrite or to predict how the Regents might rewrite its policy. Thus whatever the "surprise" that the Court foresees petitioner will experience from the view taken of the Regents' policy statement, see *ante*, at 659 n.8, will stem not from this dissent but from the Court's willingness to attribute to ambiguous statements by counsel for a state agency

for a number of reasons *including* domicile and cost equalization, nonimmigrant aliens should pay a higher tuition rate than citizens and immigrant aliens who are domiciled in the State. A student is allowed to present any and all evidence relevant to his or her status as a citizen or immigrant alien. In *Vlandis v. Kline*, this Court held only that were a State *"purport[s] to be concerned with residency*, it might not at the same time deny to one seeking to meet its test of residency the opportunity to

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the implied authority to rewrite the agency's regulations or to predict the manner in which the agency might rewrite them. Even the selected statements of counsel do not unequivocally support the Court's conclusion. As noted earlier, *supra*, at 673, while counsel for petitioner suggested that "the odds are reasonably high" that the University will modify its policy if the Court of Appeals of Maryland concludes that G-4 aliens can become domiciled in Maryland, he also emphasized that the University's other concerns, such as cost equalization, might lead the Regents to continue out-of-state classification of nonimmigrant aliens. Domicile, in other words, is not the sole concern of the University and may well not even be a "controlling concern." See also Brief for Petitioner 29-32; Tr. of Oral Arg. 19-21 (out-of-state classification of nonimmigrant aliens "serve[s] many purposes other than measuring domicile"; "the policy . . . is clearly intended to serve other purposes").

Even if the University declined to accord in-state tuition status to nonimmigrant aliens *solely* because of the University's conclusion that nonimmigrant aliens cannot be domiciled in Maryland for tuition purposes, no irrebuttable presumption would be presented. In *Vlandis v. Kline*, 412 U.S. 441 (1973), the University *presumed* that a student who was not domiciled in Connecticut at the time he first enrolled at the University of Connecticut could not become a Connecticut resident while attending the University, even though all the normal indicia of residence might be acquired during this period. Here, on the other hand, the University of Maryland merely reads Maryland law as holding that nonimmigrant G-4 aliens cannot satisfy the requirement for Maryland domicile for tuition purposes. This is purely and simply a question of state law. Respondents do not accuse petitioner of employing a nonuniversal, yet irrebuttable, presumption, but rather of misinterpreting Maryland domicile law. If the University of Maryland has misinterpreted state law, this is an error to be resolved by state, not federal, courts; no issue of federal constitutional law is presented.

show factors clearly bearing on that issue. 412 U.S., at 452." *Weinberger v. Salfi*, 422 U.S. 749, 771 (1975) (emphasis added).[5] Here, the University of Maryland's classification policy

> "does not purport to speak in terms of the bona fides of [domicile], but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns v. Malkerson*, 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns*, [respondents] are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." *Id.*, at 772.

Because it is clear that the University of Maryland has not created an irrebuttable presumption of non-Maryland domicile, it is unneccessary to decide, as the Court apparently believes it is, whether "any 'irrebuttable presumption' would be universally true." *Ante*, at 661. And while the case may become moot *if* the Court of Appeals of Maryland decides that holders of G-4 visas can establish Maryland domicile and *if* the University changes its policy in light of that decision, the case is *not* moot *now* and there is no certainty that it will become moot in the future. There is, in summary, nothing today that prevents the Court from deciding the question presented.[6]

[5] Because the tuition policy of the University of Maryland is controlled by *Weinberger v. Salfi* and not *Vlandis v. Kline*, the Court need not decide, as *amici* 29 States urge us to do, whether *Vlandis* should be overruled.

[6] Some Members of the Court may believe that resolution of the state domicile issue would be helpful in resolving respondents' equal protection claim. If the Court of Appeals of Maryland decides that nonimmigrant aliens holding G-4 visas

While I cannot join in what I view as a needless and time consuming certification, I do join in the Court's implied disapproval of the District Court's refusal to refer to Maryland courts the question of whether holders of G-4 visas can establish Maryland domicile. Upon concluding that the University's policy creates an irrebuttable presumption, the District Court was faced with the question of whether the presumption is universally true. The District Court proceeded to answer the question in the negative and enjoin the University's policy, even though

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cannot establish Maryland domicile for tuition purposes, *Starns v. Malkerson*, 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), clearly establishes that the University of Maryland can deny such nondomiciliaries lower in-state tuition rates without violating the Equal Protection Clause of the Fourteenth Amendment. If the Court of Appeals decides that holders of G-4 visas can establish Maryland domicile, on the other hand, resolution of respondents' equal protection claim may rest on the proper interpretation of *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

The only question presented by the petition for certiorari, however, is:

"Whether the decisions below should have applied Supreme Court precedents on irrebuttable presumptions, disregarded the principles articulated in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and erroneously concluded that the University of Maryland's policy of denying in-state status for tuition and fee purposes to non-immigrants holding G-4 visas establishes an. irrebuttable presumption violative of the due process clause of the fourteenth amendment to the United States Constitution?" Consideration of respondents' equal protection claim, which was never addressed below, may best be left initially to the lower courts on remand. Even if the Court ultimately decides to consider respondents' equal protection arguments, resolution of Maryland domicile law would seem irrelevant. Unlike the situation in *Nyquist*, the University of Maryland does not discriminate against *resident* aliens. Cf. 432 U.S., at 2, 4, 5-6, and n.6, and 12. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone would seem sufficient to support the line drawn by the University. See *Starns v. Malkerson, supra.*

petitioner had asked the District Court either to abstain or, apparently, to certify the question of domicile to the Court of Appeals of Maryland.[7] Because the Court of Appeals of Maryland had never addressed the question of domicile, petitioner's request should have been granted. By deciding the question itself, the District Court risked invalidating a state policy that a later decision of the Maryland state courts might establish was clearly valid. Furthermore, as the Court emphasizes, "it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts." *Ante*, at 663 n.16.

In summary, I agree with the Court that important and controlling issues of state law should initially be decided

[7] According to petitioner, he "urged both the district court and the court of appeals to defer to Maryland courts the question of whether the state law precluded G-4's from establishing Maryland domicile." Brief for Petitioner 35 n.20. The record indicates that petitioner, in his answer to respondents' complaint, urged the District Court to "abstain from exercising any jurisdiction it may possess in this action until it shall have been heard and determined fully by the courts of Maryland." Record 117. Petitioner renewed the request in his motion for summary judgment and memorandum in support thereof. *Id.*, at 211, and 239-243. In reply, respondents urged the District Court, "should [it] elect to abstain, . . . to use the certification procedure provided by the Uniform Certification of Questions of Law Act, Ann. Code of Md., Courts and Judicial Proceedings, §§ 12-601-609 (1974). Under that Act the Court of Appeals of Maryland is empowered to answer questions of state law certified to it by the United States District Court which may be determinative and as to which it appears there is no controlling precedent." *Id.*, at 274. Respondents also went on to argue, however, that the District Court need neither abstain outright nor certify the question of domicile to the Court of Appeals of Maryland, since "the Maryland common law of domicile is not at issue in this case. No 'clarification' of the Maryland common law of domicile is needed." *Id.*, at 272. The District Court, although concluding that the Maryland law of domicile *is* relevant, declined to either abstain outright or certify the question of domicile to the Court of Appeals of Maryland.

by state, not federal, courts. But because I do not believe that resolution of the Maryland law of domicile is necessary to decide the due process question before us, I dissent from today's certification.[8]

[8] While I agree with the Court's conclusion that holders of G-4 visas are not prevented *as a matter of federal law* from establishing Maryland domicile, I find it unnecessary to address the five pages of dicta that accompany that conclusion. I am nonetheless troubled by the Court's unsupported dictum that the United States may not be able to deport, under certain unspecified circumstances, a G-4 alien who terminates his employment with an international treaty organization. *Ante*, at 667.

Supreme Court of the United States

No. 77-154

Wilson H. Elkins, President, University of Maryland,
Petitioner,

v.

Juan Carlos Moreno, et al.

CERTIFICATION ORDER

(Filed April 25, 1978)

It appearing, as more fully set forth in the opinion of the Court filed in this matter on April 19, 1978, that there is involved in this case a question of law of the State of Maryland which may be determinative of this case, as to which it further appears that there is no controlling precedent in the Court of Appeals of Maryland, this Court, pursuant to Subtitle 6 of Title 12 of the Maryland Courts and Judicial Proceedings Code, hereby certifies to the Court of Appeals of Maryland, and hereby respectfully requests that Court to answer, the following question:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" It is the opinion of this Court that the facts relevant to the question certified are set out in the Court's opinion in this case.

And, accordingly, it is further ORDERED:

> That Wilson H. Elkins, President, University of Maryland, be designated as the appellant in the Certification Procedure before the Court of Appeals of

Maryland. See Maryland Rules of Procedure, Rule 896(a)(iv);

And it is further ORDERED:

That the Clerk of this Court shall transmit to the Court of Appeals of Maryland certified copies of this order, the opinion of this Court rendered herein on April 19, 1978, and the briefs, appendix, and record filed in this Court in this matter;

And it is further ORDERED:

That this Court shall retain jurisdiction of this matter and that the proceedings in this Court shall be held in abeyance until further order of this Court.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States.

Dated this 25th day
of April, 1978.

OPINION

Court of Appeals of Maryland

John S. Toll, President, University of Maryland

v.

Juan Carlos Moreno et al.

(284 Md. 425, 397 A.2d 1009 (1979))

[Misc. No. 2, September Term, 1978.]

Decided February 21, 1979.

The cause was argued before MURPHY, C. J., and SMITH, DIGGES, *LEVINE, ELDRIDGE, ORTH and COLE, JJ.

David H. Feldman, Assistant Attorney General, with whom were *Francis Bill Burch, Attorney General,* and *Robert A. Zarnoch, Assistant Attorney General,* on the brief, for appellant.

Alfred L. Scanlan, with whom were *Shea & Gardner, James R. Bieke, John Townsend Rich* and *Raymond M. Bernstein* on the brief, for appellees.

ELDRIDGE, J., delivered the opinion of the Court.

The Supreme Court of the United States, pursuant to the Uniform Certification of Questions of Law Act, Maryland Code (1974), § 12-601 *et seq.* of the Courts and Judicial Proceedings Article, requests that we answer the following question of law:

* *Reporter's Note*: Levine, J., participated in the hearing of the case and in the conference in regard to its decision but died prior to the adoption of the opinion by the Court.

"Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Elkins v. Moreno*, 435 U.S. 647, 669, 98 S. Ct. 1338, 1351, 55 L. Ed. 2d 614 (1978).

The facts pertinent to this question are as follows. The named plaintiffs in this class action, Juan C. Moreno, Juan P. Otero and Clare B. Hogg, are all nonimmigrant aliens attending the University of Maryland,[1] and they have all resided in Maryland for substantial periods of time.[2] The three students are financially dependent upon nonimmigrant parents who are employees of either the Inter-American Development Bank or the International Bank for Reconstruction and Development. As such, the plaintiffs are in this country under "G-4 visas," which is a nonimmigrant visa issued to "officers, or employees . . . of international organizations, and members of their immediate families" pursuant to 8 U.S.C. § 1101(a)(15)(G)(iv). The parents of these plaintiffs, as employees of international organizations, are by treaty exempted from federal and state taxes on their organization salaries. However, any other monies earned are fully subject to applicable federal and state income taxes.

The controversy is over these students' status for tuition purposes at the University of Maryland. Moreno, Otero and Hogg sought "in-state" tuition status at the school. The University has established a general policy statement which sets forth standards for determining under what

[1] "(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

"(G) . . . (iv) officers, or employees of . . . international organizations [recognized under the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families." 8 U.S.C. § 1101 (a) (15).

[2] Moreno has lived in Maryland for 15 years, Otero for 10 years and Hogg for 5 years.

circumstances "in-state status for admission, tuition and charge-differential purposes" should be granted. It provides:

> *"General Policy*
>
> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:
>
> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.
>
> * * * * * *
>
> "2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge differential purposes in all other cases.
>
> * * * * * *
>
> *"Definitions*
>
> "1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. . . .
>
> * * * * * *
>
> "4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time. . . ."

As part of the University's policy statement, several criteria are set forth for determining domicile:

> "a. Own or rent and occupy real property in Maryland as one's domicile on a year-round basis.

"b. Maintain a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

"c. Maintain within the State of Maryland all or substantially all personal possessions.

"d. Pay Maryland income tax on all earned income including all taxable income earned outside the State.

"e. Register all owned motor vehicles in Maryland.

"f. Possess a valid Maryland driver's license, if licensed.

"g. Register to vote in Maryland, if registered.

"h. Give a Maryland home address on federal and state income tax forms."

Moreno's application for in-state status was denied based on the school's determination that neither he nor his father were Maryland domiciliaries. Otero was refused in-state status because he was not a United States citizen nor an alien admitted for permanent residence to this country. Upon denial of their applications, in accordance with University procedures, Moreno and Otero appealed to the Inter-campus Review Committee. The Review Committee also denied the requests, stating:

"The differential in tuition for in-state and out-of-state fees is based upon the principle that the State of Maryland should subsidize only those individuals who are subject to the full scope of Maryland tax liability. Such taxes support in part the University. The University of Maryland's present classification policies rest upon this principle of cost equalization. In examining the particulars of your case it is felt that neither you nor your parents are subject to the full range of Maryland taxes (e.g., income tax) and therefore the University must classify you as out-of-state with the consequential higher tuition rate.

"You have raised the question of domicile. *It is our opinion that a holder of a G-4 visa cannot acquire the*

requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile." (Emphasis supplied.)

After the refusal by the Review Committee to grant Moreno and Otero in-state status, a final intra-school review was sought from the President of the University. He also refused their requests, stating:

"It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as 'out-of-state.'

"The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, *it is my opinion, and the position of the University, that the terms and conditions of a G-4 nonimmigrant visa preclude establishing the requisite intent necessary for Maryland domicile.* Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification." (Emphasis supplied.)

The third plaintiff, Clare B. Hogg, was also denied in-state status. Her application was initially rejected by the University because:

"[T]he policy for the determination of in-state status limits the ability to establish an in-state

classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

"Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification, as this is an important criterion in determination of domicile."

She took an appeal to the Review Committee, which said:

". . . [A] holder of a non-immigrant visa, including the G-4 visa you hold, cannot acquire the requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile."

A final administrative appeal was taken to the University President, and he rejected the application for reasons similar to those given plaintiffs Moreno and Otero.

Receiving no relief from within the University, the plaintiffs filed a class action against the school and its President in the United States District Court for the District of Maryland.[3] Plaintiffs sought injunctive and declaratory relief for themselves and other similarly situated students covered by a G-4 visa, alleging that the defendant's refusal to give them in-state status violated

[3] The District Court certified the following class:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

(a) hold or are named within a visa under 8 U.S.C. § 1101 (a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa." Moreno v. University of Maryland, 420 F. Supp. 541, 564 (1976).

various federal statutes, as well as the Due Process, Equal Protection, and Supremacy Clauses of the United States Constitution.[4]

In the District Court the plaintiffs maintained, *inter alia*, that the University's policy created an irrebuttable presumption of non-domicile in violation of the Due Process Clause of the Fourteenth Amendment. The University adopted, the plaintiffs argued, an irrebuttable presumption that G-4 visa holders are incapable of establishing Maryland domicile, a fact that is not always true. On the other hand, the defendant asserted that in-state status is determined by the Maryland common law of domicile, and that the very terms and conditions of a G-4 visa prohibit these nonimmigrant aliens from establishing Maryland domicile.

The United States District Court, in an opinion by Judge James R. Miller, Jr., determined that there was nothing in Maryland law to prevent the plaintiffs from being domiciled in this State. It also found that the terms and conditions of a G-4 visa under federal law did not render the plaintiffs legally incapable of being domiciled here. Relying on *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), the District Court held that the University's "In-State Policy" amounts to a constitutionally impermissible irrebuttable presumption which is not universally true. *Moreno v. University of Maryland*, 420 F. Supp. 541, 559-560 (D. Md. 1976).[5] The court then ordered the defendant President to allow the named plaintiffs, and others of the class, the opportunity to demonstrate that they are entitled to in-state status. The defendant took an appeal to the United States Court of

[4] Under the authority of Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the University was dismissed from the suit. However, the President of the University, in his official capacity, remained as a defendant. *See* 420 F. Supp. at 548-550.

[5] In view of the District Court's holding on the due process issue, that court deemed it unnecessary to consider the plaintiffs' alternative contentions, 420 F. Supp. at 560.

Appeals for the Fourth Circuit, which affirmed the District Court's decision, *Moreno v. Univ. of Maryland*, 556 F.2d 573 (4th Cir. 1977).

The defendant's petition for a writ of certiorari was granted by the Supreme Court of the United States. There, the University President maintained that the lower federal courts were in error in concluding that under Maryland law and federal law a G-4 visa holder can become a domiciliary of this State. In addition, the President of the University defended the constitutionality of the University's position, asking the Supreme Court to "overrule or further limit *Vlandis* [*v. Kline, supra*]." 435 U.S. at 660.

Applying the principle that decisions on constitutional issues should be avoided unless necessary, the Supreme Court expressed the view that no such showing of necessity had been made out, and that an answer to the question whether G-4 aliens were capable of becoming domiciliaries under federal law and Maryland common law might be dispositive of the case. The Court explained (435 U.S. at 661-662):

> "If G-4 aliens cannot become domiciliaries, then respondents have no due process claim under either *Vlandis* or *Salfi* for any 'irrebuttable presumption' would be universally true. On the other hand, the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can have the requisite intent.
>
> "Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case. Since the resolution of this question turns on federal statutory law and Maryland common law as to each of which there are no controlling precedents, we first set out the correct meaning of federal law in this area and then *sua*

sponte certify this case to the Court of Appeals of Maryland in order to clarify state-law aspects of the domicile question."

The Supreme Court went on to consider whether federal law prevented a person holding a G-4 visa from establishing a domicile in this State. The Court, while recognizing that generally nonimmigrant aliens may be viewed as "temporary visitors" to the United States, held that there was no legislative intent to preclude G-4 aliens from having a United States domicile. The Court sated that "it is clear that Congress did not require G-4 aliens to maintain a permanent residence abroad or to pledge to leave the United States at a date certain." *Id.* at 664. It concluded that any of the plaintiffs in this case could attain the status of a "permanent resident without difficulty." *Id.* at 668.

After dealing with the plaintiffs' status under federal law, the Supreme Court then certified to us the issue of whether such persons are "incapable as a matter of state law of becoming domiciliaries of Maryland." *Id.* at 669.

I.

In this Court, the first argument made by the defendant University President is that, irrespective of the general Maryland law of domicile, the University is authorized under state law[6] to establish such rules for tuition fees as it sees fit, and in this connection, to define "residence" as it shall determine. The University President argues that even if G-4 aliens possess the legal capacity to become Maryland domiciliaries, the school has the independent legal authority to apply a more restrictive standard which would exclude persons under G-4 visas from consideration for in-state status.[7]

[6] Code (1957, 1975 Repl. Vol.), Art. 77A, § 15 (e), now Code (1978), § 13-104 (b) of the Education Article.

[7] Consistent with this view, the Board of Regents of the University passed a resolution on June 23, 1978, declaring that:

"The Board of Regents deems it statutory authority under the laws of Maryland to include the power, right, or

In response, the plaintiffs assert that the question of the school's authority to adopt its own standards for in-state status is not before this Court, and that the question certified for our consideration is limited to whether Maryland common law renders G-4 visa holders incapable of becoming domiciliaries of this State.

We agree with the plaintiffs in this regard. The specific question certified, in light of the Supreme Court's opinion in this case, is whether a person covered by a G-4 visa can become, *as a matter of Maryland common law,* a domiciliary of this State. The question concerns the general Maryland law of domicile and not the specific authority of the University under the Education Article of the Code. This is clear from the Supreme Court's opinion.

In setting forth its view of the dispute in this case, the Supreme Court stated (435 U.S. at 658-660, emphasis supplied):

> "The University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of its policy statement it's 'paramount' and controlling concern is with domicile as defined by the courts of Maryland. It has eschewed any interest in creating a classwide exclusion based solely on nonimmigrant status or, apparently, on the fact that many G-4 aliens receive earned income that is exempt from Maryland taxation. Because *petitioner makes domicile the 'paramount' policy consideration* and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.' *Weinberger v. Salfi,* 422 U.S. at 771."

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privilege to adopt a more restrictive definition of domicile for purposes of according in-state status for admissions, tuition, and charge-differentials than may be applicable generally or otherwise under the Maryland common law."

This understanding of the defendant University President's position was based in part on the defendant's statement that "'the "In-State Policy" is structured upon and reflects [the University's] understanding of the Maryland *common law of domicile*.'" (Emphasis supplied.) *Id.* at 660 n.8 The Supreme Court's majority opinion specifically disputed the dissent's view of the issues in the case (which view the defendant is apparently now attempting to adopt for the first ime in this Court), saying (*id.* at 659 n.8, emphasis in original):

> "Petitioner will be surprised to learn from the dissent . . . that the University's treatment of respondents is not really determined by the Maryland common law of domicile and therefore that this case is governed by *Weinberger v. Salfi*, 422 U.S. 749 (1975), not *Vlandis v. Kline*, 412 U.S. 441 (1973). For petitioner's view of the University's policy, contrary to that suggested by the dissent, has consistently been: "The Defendant University distinguishes between *domiciliaries* and *nondomiciliaries* of the State of Maryland . . . This represents a policy decision of the Board of Regents of the University, which has been implemented in the rules and guidelines of the Policy Statement . . ." Record 215 (emphasis added). And again: "The wording of the "In-State" policy is structured so as to initially deny "in-state" status to non-immigrant aliens. This structure incorporates the determination that under the law and definition of *domicile as established and applied by Maryland courts*, non-immigrant aliens cannot display the intent to permanently reside within the State which is requisite to establishing Maryland domicile.'"

A further indication that the Supreme Court was concerned with the Maryland common law of domicile is evidenced by its comment that

> "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens

> were the Maryland courts to hold that G-4 aliens can have the requisite intent." *Id.* at 661.

And counsel for the University President stated in oral argument to the Supreme Court

> "that if the Court of Appeals of Maryland determined that a person with a G-4 visa is capable of forming the requisite intent to establish domicile, 'the odds are reasonably high that the case would become moot because the university would change its policy, but that judgment is one that would be made by the regents . . .'" *Id.* at 661-662 n.13.

Based upon this examination of the Supreme Court's opinion, it is evident that the defendant changed his position. In short, prior to the present proceedings in this Court, the University President maintained that the Maryland common law of domicile prevented G-4 aliens from having in-state status. Here, in a marked departure from his earlier position, the defendant insists that regardless of the general Maryland law of domicile, the University has the authority to adopt more restrictive standards for in-state status at the University. We concur with the plaintiffs that the certified question concerns the Maryland common law of domicile, and that the defendant's arguments relating to the University's power to adopt different criteria for in-state status are beyond the scope of the question. "[T]he Uniform Certification of Questions of Law Act, Code (1974), §§ 12-601 *et seq.*, of the Courts and Judicial Proceedings Article, does not authorize us to go beyond the questions certified in the order of the certifying court." *Krashes v. White*, 275 Md. 549, 557, 341 A.2d 798 (1975). Consequently, we shall confine our discussion to the Maryland common law of domicile and its effect upon persons covered by G-4 visas.

II

The defendant's remaining contentions in this Court do purport to relate to the general Maryland law of domicile.

First, he contends that, under Maryland common law, domicile is not a unitary concept and that the meaning of domicile varies depending upon the particular context in which the concept is used. The defendant insists that in the present context, the University's policies, of limiting its expenditures and equalizing the costs of public education between those who have and those who have not contributed through income tax payments, compel the conclusion that G-4 visa holders are incapable of establishing a Maryland domicile.

Alternatively, the defendant argues that "[e]ven under domiciliary rules applied in other contexts," the plaintiffs cannot be domiciled in Maryland. In support of this argument, the defendant appears to rely on his assertion that "[m]ost nonimmigrants are neither expected nor permitted to stay here indefinitely," that G-4 visa holders' "lucrative salaries are not subject to State income tax," and that such persons cannot vote in Maryland.

(a)

An examination of the cases in this Court dealing with domicile demonstrates that the defendant's first contention regarding the law of domicile is untenable. The meaning of domicile and the basic principles for determining domicile have been the same in this State regardless of the context in which the issue of domicile arose.

The meaning of domicile and the principles for deciding domicile were recently summarized by Judge Smith for the Court in *Dorf v. Skolnik*, 280 Md. 101, 116-117, 371 A.2d 1094 (1977):

> "A person may have several places of abode or dwelling, but he can have only one domicile at a time. Domicile has been defined as the place with which an individual has a settled connection for legal purposes and the place where a person has his true, fixed, permanent home, habitation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning. The controlling

> factor in determining a person's domicile is his intent. One's domicile, generally, is that place where he intends it to be. The determination of his intent, however, is not dependent upon what he says at a particular time, since his intent may be more satisfactorily shown by what is done than by what is said. Once a domicile is determined or established a person retains his domicile at such place unless the evidence affirmatively shows an abandonment of that domicile. In deciding whether a person has abandoned a previously established domicile and acquired a new one, courts will examine and weigh the factors relating to each place. This Court has never deemed any single circumstance conclusive. However, it has viewed certain factors as more important than others, the two most important being where a person actually lives and where he votes. Where a person lives and votes at the same place such place probably will be determined to constitute his domicile. Where these factors are not so clear, however, or where there are special circumstances explaining a particular place of abode or place of voting, the Court will look to and weigh a number of other factors in deciding a person's domicile."

The Court went on in *Dorf*, quoting from *Bainum v. Kalen*, 272 Md. 490, 499, 325 A.2d 392 (1974), to list many of the other factors to be considered in determining a person's domicile:

> " 'These include such things as: the paying of taxes and statements on tax returns; the ownership of property; where the person's children attend school; the address at which one receives mail; statements as to residency contained in contracts or other documents; statements on licenses or governmental documents; where furniture and other personal belongings are kept; which jurisdiction's banks are utilized; membership in professional, fraternal, religious or social organizations; where one's regular physicians and dentists are located; where one maintains charge accounts; and any other facts revealing contact with one or the other jurisdiction.' "

This Court's decisions involving domicile disclose that the above-quoted principles have been applied in all contexts. The issue of domicile has arisen in a variety of situations. *Dorf v. Skolnik, supra,* and *Bainum v. Kalen, supra,* were concerned with domicile as a qualification for office, as were *Gallagher v. Bd. of Elections,* 219 Md. 192, 148 A.2d 390 (1959), and *Rasin v. Leaverton,* 181 Md. 91, 28 A.2d 612 (1942). The same legal principles were applied in the cases involving domicile as a qualification for voting, *Howard v. Skinner,* 87 Md. 556, 40 A. 379 (1898); *Thomas v. Warner,* 83 Md. 14, 20-21, 34 A. 830 (1896); *Langhammer v. Munter,* 80 Md. 518, 31 A. 300 (1895); *Schaeffer v. Gilbert,* 73 Md. 66, 20 A. 434 (1890). Many other cases involve the totally dissimilar context of domicile for the purpose of administering decedents' estates, *Hall, Admx. v. Morris,* 213 Md. 396, 132 A.2d 113 (1957); *Shapiro v. Marcus,* 211 Md. 83, 124 A.2d 846 (1956); *Shenton v. Abbott,* 178 Md. 526, 15 A.2d 906 (1940); *Pattison v. Firor,* 146 Md. 243, 126 A. 109 (1924); *Brafman v. Brafman,* 144 Md. 413, 125 A. 161, *cert. denied,* 265 U.S. 588, 44 S. Ct. 633, 68 L. Ed. 1193 (1924); *Whiting v. Shipley,* 127 Md. 113, 117, 96 A. 285 (1915). Nevertheless, these cases also set forth the identical principles governing domicile as were summarized in *Dorf v. Skolnik, supra.*

The same is true of the following cases. In *Harrison v. Harrison,* 117 Md. 607, 613-616, 84 A. 57 (1912), the determination of domicile was necessary to decide where a divorce action should have been filed, and in *Walker v. Walker,* 125 Md. 649, 661-665, 94 A. 346 (1915), the domicile of the parties was controlling in deciding whether a divorce decree of another state was entitled to full faith and credit. A number of cases have involved domicile in order to be eligible to file a claim, arising from a motor vehicle accident caused by an uninsured motorist, against the former Unsatisfied Claim and Judgment Fund, *Hawks v. Gottschall,* 241 Md. 147, 152, 215 A.2d 745 (1966); *Walsh, Adm'r v. Crouse,* 232 Md. 386, 194 A.2d 107 (1963); *Maddy v. Jones,* 230 Md. 172, 179-180, 186 A.2d 482

(1962). *Wagner v. Scurlock*, 166 Md. 284, 170 A. 539 (1934), was concerned with domicile because of a statute relating to service of process on non-residents of Maryland in an action based on a motor vehicle accident in this State. Domicile for income tax purposes was an issue in *Comptroller v. Lenderking*, 268 Md. 613, 303 A.2d 402 (1973). Finally, more than one hundred years ago, this Court dealt with the question of one's domicile in the context of a statute restricting the importation of slaves into Maryland, *Ringgold v. Barley*, 5 Md. 186 (1854). All of these cases, involving many diverse matters, reflect the standard definition of domicile and the same basic principles for ascertaining domicile, regardless of the context.

Moreover, cases involving domicile for one purpose have regularly relied upon cases involving domicile for a totally different purpose. *See, e.g., Bainum v. Kalen, supra*, 272 Md. at 497-498; *Comptroller v. Lenderking, supra*, 268 Md. at 617-620; *Maddy v. Jones, supra*, 230 Md. at 180-182; *Shenton v. Abbott, supra*, 178 Md. at 530-533; *Wagner v. Scurlock, supra*, 166 Md. at 291-293. In sum, domicile has been viewed as a unitary concept in Maryland.

It is true, as the defendant in the present case points out, that the rules for determining domicile may be applied differently because of particular circumstances. For example, where a person votes is ordinarily one of the most important factors a court looks to in resolving the issue of his domicile. *Dorf v. Skolnik, supra*, 280 Md. at 117; *Bainum v. Kalen, supra*, 272 Md. at 498. On the other hand, there may be special circumstances in a particular case explaining why a person did or did not vote in a certain place, revealing that the place of voting in that case was not the best indication of where the person intended his domicile to be. *Gallagher v. Bd. of Elections, supra*, 219 Md. at 200; *Wagner v. Scurlock, supra*, 166 Md. at 292. However, such differences in applying the principles of domicile do not depend upon, or vary with, the purpose for ascertaining domicile or the type of case involved. Rather, the differences arise because of the facts in particular cases.

The very nature of domicile, depending upon one's intent as objectively shown by a multitude of factors associated with that particular individual, will result in differences of application. Moreover, in some contexts there may be special statutory or constitutional requirements in addition to domicile, such as being domiciled in a place for a certain duration. *See, e.g., Bainum v. Kalen, supra; Gallagher v. Bd. of Elections, supra.* But this does not mean that the meaning of domicile itself, or the basic rules for determining it, vary with the context. Regardless of some views expressed by commentators,[8] in Maryland, as in the majority of jurisdictions,[9] the meaning and basic principles for determining domicile do not vary depending on the context.

(b)

In his final argument, the defendant University President asserts that even if domicile is a unitary concept, G-4 visa holders are incapable of becoming domiciled in Maryland because most nonimmigrants are neither expected nor permitted to remain here indefinitely, G-4 visa holders' salaries are not subject to Maryland income tax, and they cannot vote in Maryland. In our view, none of these circumstances renders a G-4 visa holder incapable, as a matter of law, from becoming domiciled in this State.

The defendant's reliance upon the assertion that most nonimmigrants are neither expected nor permitted to remain in this country indefinitely was effectively undercut by the Supreme Court's opinion in the instant case. The nature of a G-4 visa, as well as the control over immigration generally, is a matter of federal law, *Nyquist v. Mauclet,* 432 U.S. 1, 97 S. Ct. 2120, 2126, 53 L. Ed. 2d 63 (1977), and cases there cited. If under federal law a particular individual must leave this country at a certain

[8] *See, e.g.,* Reese, *Does Domicile Bear a Single Meaning?,* 55 Col. L. Rev. 589, 597 (1955).

[9] Elkins v. Moreno, 435 U.S. 647, 669 n.29, 98 S. Ct. 1338, 1351 n.29, 55 L. Ed. 2d 614 (1978), citing Restatement (Second) of Conflict of Laws § 11, Comment o, p. 47 (1971).

date, or cannot remain here indefinitely, then he could not become domiciled in Maryland. Any purported intent to live here indefinitely would be inconsistent with law. It would at most be an unrealistic subjective intent, which is insufficient under Maryland law to establish domicile. *Dorf v. Skolnik, supra,* 280 Md. at 116-117; *Bainum v. Kalen, supra,* 272 Md. at 497; *Wagner v. Scurlock, supra,* 166 Md. at 292; *Harrison v. Harrison, supra,* 117 Md. at 614.

However, the Supreme Court in the instant case stated that under federal law, holders of G-4 visas did not have to maintain a permanent residence abroad and did not have to leave this country at a certain date. The Court pointed out that Congress was willing to allow nonrestricted nonimmigrant aliens such as G-4 visa holders "to adopt the United States as their domicile." The Supreme Court went on to say that if a G-4 visa holder developed the "intent to stay indefinitely in the United States, he would be able to do so without violating" federal law or the terms of his visa. The Court concluded by stating that a G-4 visa holder could attain the status of "permanent resident without difficulty." *Elkins v. Moreno, supra,* 435 U.S. at 664-668.

In light of the Supreme Court's interpretation of federal law, it is obvious that nothing inherent in the nature of a G-4 visa would render the holder of such visa absolutely incapable of establishing a Maryland domicile. Assuming the correctness of the defendant's assertion that *most* G-4 visa holders will leave this country, if in a particular case one of these individuals is in a minority and, as shown by objective factors, intends for Maryland to be his fixed place of abode and intends to remain here indefinitely, he will have satisfied the Maryland standard for establishing domicile in this State.

The defendant also relies upon the fact that the salaries of G-4 visa holders from international organizations are exempt from Maryland income tax. It is true that where a person pays taxes is one of the many circumstances which

are considered in determining domicile, *Bainum v. Kalen, supra,* 272 Md. at 499. However, "[t]his Court has never deemed any single circumstance conclusive," *Dorf v. Skolnik, supra,* 280 Md. at 117; *Bainum v. Kalen, supra,* 272 Md. at 498. Consequently, of the usual circumstances which are considered under Maryland law to ascertain domicile, no one circumstance will render a person incapable of establishing a Maryland domicile. Instead, all of the factors relating to the different jurisdictions in question must be examined and weighed. *Dorf* at 117; *Bainum* at 498[10]

What we have just said is largely dispositive of the defendant's reliance upon the inability of G-4 aliens to vote in Maryland. Although voting and place of residence are generally considered the most important factors in determining domicile, they are not conclusive. *Dorf* at 117; *Bainum* at 498. Moreover, as previously pointed out, there may be special circumstances involved in particular cases showing that the place of voting, or not voting, was not a good indicator of intent regarding domicile and should be given little weight. *Gallagher v. Bd. of Elections, supra,* 219 Md. at 200; *Wagner v. Scurlock, supra,* 166 Md. at 292. Since a G-4 visa holder could not as a matter of law vote in Maryland even if he desired to, his failure to vote here

[10] In connection with the factor of where one pays taxes, it should be pointed out that G-4 aliens residing in Maryland are subject to Maryland taxes generally, including income tax. However, the portion of their income representing salaries from international organizations is, by treaty, tax exempt. Of course, all treaties made under the authority of the United States are part of the law of Maryland. Constitution of the United States, Art. VI, Cl. 2. In fact, Article 2 of the Maryland Declaration of Rights declares that "all Treaties made . . . under the authority of the United States, are . . . the Supreme Law of the *State*." (Emphasis added.) That one has income which is tax exempt as a matter of law is quite different from the factor that has been deemed significant in prior domicile cases, namely to which jurisdiction does he pay taxes. However, we do not now foreclose the possibility that circumstances could be shown whereby a tax exemption, such as exists here, might have a bearing upon one's intent regarding his domicile.

would seem to indicate little concerning domicile.[11] At any rate, this factor itself clearly does not preclude a G-4 alien from becoming domiciled in Maryland.

Since nothing in the general Maryland law of domicile renders G-4 visa holders, or their dependents, incapable of becoming domiciled in this State, the answer to the certified question is "No."

Question of law answered as herein set forth.
Appellant to pay costs in this Court.

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[11] On the other hand, his continuing to vote elsewhere might be quite significant.

OPINION

Supreme Court of the United States

Toll, President University of Maryland

v.

Moreno et al.

(441 U.S. 458 (1979))

Certiorari to the United States Court of Appeals
For the Fourth Circuit

No. 77-154. Argued February 22, 1978 — Question certified April 19, 1978 — Decided April 30, 1979

PER CURIAM.

This decision supplements *Elkins v. Moreno*, 435 U.S. 647 (1978), decided last Term. Respondents in *Elkins* represented a class of nonimmigrant alien residents of Maryland who either held or were financially dependent upon a person who held a "G-4 visa," that is, a nonimmigrant visa granted to "officers, or employees of . . . international organizations, and the members of their immediate families" pursuant to 8 U.S.C. § 1101(a)(15)(G)(iv). Respondents were not granted "in-state" status for tuition purposes at the University of Maryland because they were conclusively presumed by the University to be nondomiciliaries of the State. Respondents brought suit against the University and its President, alleging that the University's failure to grant respondents in-state status violated various federal laws, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause. The District Court held for respondents on the ground that the

University's procedures for determining in-state status violated principles established in *Vlandis v. Kline*, 412 U.S. 441 (1973), and the Court of Appeals affirmed. *Moreno v. University of Maryland*, 420 F. Supp. 541 (Md. (1976), affirmance order, 556 F.2d 573 (CA 4 1977).

In *Elkins v. Moreno, supra*, we held that "[b]ecause petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.' *Weinberger v. Salfi*, 422 U.S. [749,] 771 [1975]." 435 U.S., at 660. Since the applicability of *Vlandis* depended on whether respondents could in fact become Maryland domiciliaries, we certified, pursuant to Subtit. 6 of Tit. 12 of the Md. Cts. & Jud. Proc. Code (1974), the following question to the Maryland Court of Appeals:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Elkins v. Moreno, supra*, at 668-669.

On June 23, 1978, approximately two months after the decision in *Elkins*,* the Board of Regents of the University of Maryland unanimously adopted "A Resolution Clarifying the Purposes, Meaning, and Application of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar as It Denies In-State Status to Nonimmigrant Aliens." In this resolution, the Board of Regents stated, *inter alia:*

* The order certifying the question to the Maryland Court of Appeals was dated April 25, 1978.

"*Purposes and Interests of In-State Policy.* The Board of Regents finds and declares that the policy approved on September 21, 1973, insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:

"(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;

"(b) achieving equalization between the affected classes of the expenses of providing educational services;

"(c) efficiently administering the University's in-state determination and appeals process; and

"(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

"*Reaffirmation of In-State Policy.* Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law, the Board of Regents reaffirms that policy because it intends and deems it to serve a number of substantial purposes and interests, including but not limited to those set forth above."

On February 21, 1979, the Maryland Court of Appeals unanimously answered our certified question in the negative, stating that "[s]ince nothing in the general Maryland law of domicile renders G-4 visa holers, or their dependents, incapable of becoming domiciled in this State, the answer to the certified question is 'No.'" *Toll v. Moreno*, 284 Md. 425, 444, 397 A.2d 1009, 1019. The Maryland Court of Appeals also declined to consider the implications

of the Board of Regents' clarifying resolution, because, although the resolution represented a change of the University's position, the implications of that change were beyond the scope of the certified question. *Id.* at 436-437, 397 A.2d, at 1014-1015.

The Attorney General of Maryland now requests that this case "be restored to the Supreme Court's active docket for further briefing and argument . . ." We must deny this request because the Board of Regents' clarifying resolution has fundamentally altered the posture of the case. Our decision in *Elkins* rests on the premise that "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can" acquire such domicile. 435 U.S., at 661. After the clarifying resolution, this premise no longer appears to be true. And if domicile is not the "paramount" policy consideration of the University, this case is no longer "squarely within *Vlandis* as limited by *Salfi* . . ." *Id.*, at 660. The clarifying resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court. We therefore vacate the judgment of the Court of Appeals and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978.

So ordered.

Supreme Court of the United States

No. 77-154

John S. Toll, President, University of Maryland,

Petitioner,

v.

Juan Carlos Moreno, et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Fourth Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the Court of Appeals in this cause is vacated; and that this cause is remanded to the United States District Court for the District of Maryland for further consideration in light of the Court's opinion and judgment in *Elkins v. Moreno;* opinion and judgment of Court of Appeals of Maryland in *Toll v. Moreno;* and Board of Regents' Clarifying Resolution of June 23, 1978.

April 30, 1979

UNITED STATES CODE

Title 8, Section 1101(a)(15)

The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

(A) (i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

(G) (i) a designated principal resident representative of a foreign government recognized de jure by the United

States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability, and who, in the case of a graduate of a medical school coming to the United States to perform services as a member of the medical profession, is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor

cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor. research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

(K) an alien who is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after entry, and the minor children of such fiancée or fiancé accompanying him or following to join him.

(L) an alien who, immediately preceding the time of his application for admission into the United States, has been

employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

UNIVERSITY OF MARYLAND

DETERMINATION OF IN-STATE STATUS FOR ADMISSION, TUITION, AND CHARGE-DIFFERENTIAL PURPOSES[1]

An initial determination of in-state status for admission, tuition, and charge-differential purposes will be made by the University at the time a student's application for admission is under consideration. The determination made at that time, and any determination made thereafter, shall prevail in each semester until the determination is successfully challenged prior to the last day available for registration for the forthcoming semester. A determination regarding in-state status may be changed for any subsequent semester if circumstances, as later defined, warrant redetermination.

In those instances where an entering class size is established and where an application deadline is stated, in-state conditions for admissions must be satisfied as of the announced closing application date.

General Policy

1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

   a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

[1] Draft of August 31, 1973 as amended on September 7, 1973. Approved by the Board of Regents on September 21, 1973 to become effective with any term of the University beginning on or after January 1, 1974.

b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester.

c. Where a student is the spouse or a dependent child of a full-time employee of the University.

d. Where a student who is a member of the Armed Forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

e. Where a student is a full-time employee of the University of Maryland.

2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge-differential purposes in all other cases.

3. Each campus of the University will be responsible for making the in-state determination for the prospective or enrolled student.

4. In-state status is lost at any time a financially independent student establishes a domicile outside the State of Maryland. If the parent(s) or other persons through whom the student has attained in-state status establishes a domicile in another state, the student shall be assessed out-of-state tuition and charges six months after the out-of-state move occurs.

5. The terms of this policy will not be applied retroactively.

Definitions

1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person.

Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

2. A parent includes a natural parent, an adoptive parent, a legally-appointed guardian, and a person who stands *in loco parentis* to the student.

3. A spouse is a partner in a legally contracted marriage.

4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time.

5. The masculine gender of personal pronouns includes the feminine gender.

Application

1. A student requesting redetermination to in-state status who asserts that he is *financially dependent* upon a parent(s) or spouse domiciled in Maryland, as previously defined, will be required to produce by affidavit, in addition to other proof, documentation of the student's earnings for the year immediately preceding the last day of registration for the semester for which the determination is requested. Such documentation shall include relevant income tax returns, statements from employers, and/or federal and state withholding forms. An affidavit showing all expenses of the student for the same period must also be submitted.

2. A student requesting redetermination to in-state status who asserts that he is *financially independent* will be required to present by affidavit documentation cited in paragraph 1.

3. In determining domicile, the University shall take into consideration, but shall not be limited to, the following criteria as they pertain to the individual case:

a. Own or rent and occupy real property in Maryland as one's domicile on a year-around basis.

b. Maintain a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintain within the State of Maryland all or substantially all personal possessions.

d. Pay Maryland income tax on all earned income including all taxable income earned outside the State.

e. Register all owned motor vehicles in Maryland.

f. Possess a valid Maryland driver's license, if licensed.

g. Register to vote in Maryland, if registered.

h. Give a Maryland home address on federal and state income tax forms.

N.B. The documentation offered in these instances may be required to be in affidavit form.

Appeals

A student who disagrees with his classification may request a personal interview with a campus classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee (IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final.

Implementation

The implementation of this new policy to those eligible for redetermination will require an extended

period of time. It is hoped that a decision in each case will be made within ninety (90) days of a request for redetermination. During this period of time, or any further period of time required by the University, fees and charges based on the previous determination must be paid. If the determination is changed, any excess fees and charges will be refunded.

* * * * * *

NOTE: The deadline for meeting all requirements for an in-state status and for submitting all documents for reclassification is the last day of late registration for the semester the student wishes to be classified as an in-state student.

RESOLUTION

A RESOLUTION CLARIFYING THE PURPOSES, MEANING, AND APPLICATION OF THE POLICY OF THE UNIVERSITY OF MARYLAND FOR DETERMINATION OF IN-STATE STATUS FOR ADMISSION, TUITION, AND CHARGE-DIFFERENTIAL PURPOSES, INSOFAR AS IT DENIES IN-STATE STATUS TO NONIMMIGRANT ALIENS.

WHEREAS, the Board of Regents, on September 21, 1973, approved a policy for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, to become effective with any term of the University beginning on or after January 1, 1974; and

WHEREAS, questions have been raised as to the purposes, meaning, and application of this policy, insofar as it denies in-state status to nonimmigrant aliens; and

WHEREAS, on April 25, 1978, in accordance with its opinion filed April 19, 1978, the Supreme Court of the United States entered a Certification Order in *Elkins v. Moreno,* No. 77-154, requesting the Court of Appeals of Maryland to answer the following question:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?"; and

WHEREAS, the Board of Regents is required by it Autonomy Act [Md. Ann. Code art. 77A, § 15(e) (Supp. 1977)] to "exercise with reference to the University of Maryland . . . all of the powers, rights, and privileges that go with the responsibility of management . . . [without being] superseded in authority by any other State board, bureau, department or commission, in the management of the University's affairs."; and

WHEREAS, clarification of the purposes, meaning, and application of the policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, insofar as it denies in-state status to nonimmigrant aliens, might be helpful in the resolution of the issues pending in the aforementioned litigation and, in any event, would be desirable and in the public interest;

NOW, THEREFORE, BE IT RESOLVED, BY THE BOARD OF REGENTS:

(1) *Statutory Authority.* The Board of Regents deems its statutory authority under the laws of Maryland to include the power, right, or privilege to adopt a more restrictive definition of domicile for purposes of according in-state status for admissions, tuition, and charge-differentials than may be applicable generally or otherwise under the Maryland common law.

(2) *Exercise of Authority.* In accordance with its statutory authority under the laws of Maryland, as set forth above, the Board of Regents approved a policy for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes on September 21, 1973, that adopted a definition of domicile which required, among other things, United States citizenship or lawful admission for permanent residence in accordance with the laws of the United States in order to qualify for in-state status.

(3) *Purposes and Interests of In-State Policy.* The Board of Regents finds and declares that the policy approved on September 21, 1973, insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:

(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons

who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;

(b) achieving equalization between the affected classes of the expenses of providing educational services;

(c) efficiently administering the University's in-state determination and appeals process; and

(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

(4) *Reaffirmation of In-State Policy.* Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law, the Board of Regents reaffirms that policy because it intends and deems it to serve a number of substantial purposes and interests, including but not limited to those set forth above.

(5) *Transmission of this Resolution.* The Secretary of the Board of Regents is hereby authorized and directed to cause a copy of this Resolution, over the official seal of the University of Maryland, to be transmitted forthwith to:

(a) the Clerk of the Court of Appeals of Maryland, for the information of that Court;

(b) the Clerk of the Supreme Court of the United States, for the information of that Court;

(c) counsel for the University of Maryland; and

(d) counsel for Juan Carlos Moreno, et al.

* * * * * *

I, Samuel H. Hoover, Secretary of the Board of Regents, do hereby certify the foregoing to be a true and correct copy of a resolution adopted by the Board of Regents of the University of Maryland at a meeting of the said Board held in College Park on Friday, June 23, 1978, at which a quorum of the Board was present, that said resolution was

unanimously adopted and the same has not been amended in any respect.

Witness my hand and the official seal of the University of Maryland this 23rd day of June, 1978.

SAMUEL H. HOOVER,
Secretary,
Board of Regents,
University of Maryland.

(SEAL)